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In the Supreme Court of the United States

October Term, 1929.

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION OF MARSHALL L. MOTT FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHAS B. ROGERS,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. ____

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION OF MARSHALL L. MOTT FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, Marshall L. Mott, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above entitled cause on the 3rd day of February, 1930 (R. 72), reversing the decree of the District Court of the United States for the Northern District of Oklahoma, entered by said court on May 16th, 1929 (R. 57-59), and remanding said cause to the lower court with instructions to permit the United States to file said second amended bill of complaint and to grant to the defendant Mott time in which to make his answer thereto (R. 72).

Questions Presented.

Questions presented in this case are:

1. Has the Secretary of the Interior under the provisions of the Act of May 27, 1908, sections 1 and 2 (35 Stat. 312), and the rules and regulations by him promulgated relative to the execution and approval of oil and gas leases upon the restricted lands of an adult full-blood Creek Indian, power and authority to unconditionally release a portion of the royalty fund derived from said lease, held by him under the rules and regulations aforesaid, and transfer the same in accordance with the request of said Indian?

2. Has the Secretary of the Interior, holding funds derived from royalty under an oil and gas mining lease, executed and approved under the provisions of the act aforesaid (May 27, 1908, Secs. 1 and 2, 35 Stat. 312), and in accordance with amended section 24 of the regulations of said Secretary theretofore duly promulgated, which amended section provides:

> "* * * that in such individual case or class of cases as the Secretary of the Interior may direct, the Superintendent of the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties, and other individual funds of the restricted Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in such case."

Section 8 of which lease provides:

> "This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force,

relative to such leases, all of which regulations are made a part and condition of this lease; * * *"

power and authority to distribute a portion thereof as a gift *inter vivos* to the lawful wife of said adult restricted full-blood Creek Indian, in accordance with the written request of such Indian?

3. Is the disbursement by the Secretary of the Interior of a portion of such trust fund, in accordance with the written request of such adult restricted full-blood Indian to make a gift *inter vivos* to his lawful wife, in the absence of fraud on the part of or deception practiced upon said official, subject to judicial review by the courts?

4. Is the authority and discretionary power of the Secretary of the Interior in the disposal of the trust funds belonging to an adult, restricted, full-blood Creek Indian, who is neither insane nor an idiot, derived from royalties under an oil and gas mining lease, executed by the Indian and approved by the Secretary under the provisions of sections 1 and 2 of the Act of May 27, 1908 (35 Stat. 312), and in accordance with the rules and regulations of the Secretary, duly promulgated with reference thereto, and especially amended section 24 aforesaid, *limited, restricted* or *qualified* by the degree of mental capacity of the Indian owner of the funds?

Statement of the Case.

Proceeding: This suit was instituted in the United States District Court for the Northern District of Oklahoma by the United States against Marshall L. Mott, as de-

fendant, to recover and have returned to the United States, to be placed in the Department of the Interior, Fifteen Thousand Dollars value of United States bonds, formerly under control of the Secretary of the Interior as restricted funds of Jackson Barnett, an enrolled, adult full-blood, restricted Creek Indian, and to recover interest collected thereon, and for an accounting from the defendant; and, if said bonds cannot be recovered, then for the value thereof.

The original bill of complaint (not in the record) was based upon the theory and attempted to charge fraud in the transactions involved upon the part of the officials of the Interior Department.

The United States filed its first amended complaint (R. 1-34), which was based upon an alleged fraudulent combination and scheme to defraud Barnett of his wealth and estate and to defraud the United States. The bill alleged in the alternative that either the Secretary was deceived by false representations in the official recommendation of the gifts or that he (the Secretary) was himself a party to the plan and scheme, and participated therein.

A motion and supplemental motion to dismiss the amended bill of complaint was filed by the defendant Mott (R. 34-43).

Pending the hearing of said motion and supplemental motion to dismiss, the Department of Justice abandoned its position and concluded that allegations of fraud or imposition upon or collusion with or deception of government officers or of the United States could not be established.

Thereafter, and while said motions to dismiss were pending, the United States filed its application for leave to file a second amended bill of complaint. (R. 44-53).

Thereafter defendant Mott filed his response to the application for leave to file a second amended complaint by the United States, in the nature of objections to the granting of the application of the government (R. 53-54).

Thereafter, the matter coming on for hearing before Hon. JOHN C. POLLOCK, United States District Judge, on the motions to dismiss the amended bill of complaint, the application of the government to file its proposed second amended complaint and the objections of defendant Mott to said application of the government, the court announced its opinion and decision (R. 55-57) denying the government's application to file said second amended complaint on the ground that the facts therein stated were insufficient to constitute a valid cause of action or to entitled the government to the relief prayed for, and treating the government's application as confessing the motion to dismiss the first amended bill of complaint, and the court thereupon denied the motion and application of the government for leave to file the second amended complaint and dismissing said action and thereafter on May 16, 1929, entered its order and decree in accordance with its opinion (R. 57-58).

Within due time and upon exceptions taken by the government, appeal was duly perfected and taken (R. 59-62) to the Circuit Court of Appeals for the Tenth Circuit, and the Court of Appeals rendered its judgment and decree

reversing the judgment and decree of the United States District Court for the Northern District of Oklahoma, which was entered on February 3, 1929 (R. 72).

Statement of Facts Alleged in Second Amended Bill.

The facts alleged (R. 46-53) are:

That Jackson Barnett was an adult, enrolled, full-blood member of the Creek Tribe of Indians, one of the Five Civilized Tribes, about 78 years of age, and was allotted and owned lands in said nation in fee, subject only to restrictions against alienation thereof prior to April 26, 1931, and upon which lands in 1912, an oil and gas mining lease (R. 47) was duly executed and approved by the Secretary of the Interior under the provisions of sections 1 and 2 of the Act of May 27, 1908 (35 Stat. 312), pursuant to the regulations promulgated by the Secretary of the Interior relative thereto as authorized by said act.

That royalties provided for in said lease had up to February 1st, 1923, accumulated in the hands of the Superintendent of the Five Civilized Tribes to the credit of Jackson Barnett, and subject to the control of the Secretary of the Interior, in the sum of $1,156,750.00.

That Jackson Barnett is alleged to be a mental incompetent, illiterate and incapable of managing his affairs and caring for his property and person and to understand the nature and extent of his property, and by reason of his mental infirmity he was unable to realize or understand the portions of his property which he requested to be transferred to his wife as a gift *inter vivos*.

That on February 1, 1923, the Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs and upon the written request of Jackson Barnett, transferred and delivered to A. J. Ward, Creek Tribal Attorney, for the use and benefit of the American Baptist Home Mission Society, in trust, to be delivered to the Equitable Trust Company of New York, as trustee, $550,000.00 face value of bonds, and from the income of which trust fund twenty thousand dollars per year was to be paid to the Superintendent of the Five Civilized Tribes for the use of said Barnett, during his lifetime; and at the same time and as a part of the same transaction, and upon the written request of Jackson Barnett said Secretary delivered to and into the hands of Anna Laura Barnett, wife of said Barnett, United States bonds of the par value of five hundred and fifty thousand dollars, two hundred thousand dollars of which Anna Laura Barnett, his wife, agreed would be placed in a trust with the Riggs National Bank as trustee, which was done, to remain during the life of Jackson Barnett, providing for the payment to *him* personally, from the income thereof, of seven thousand five hundred dollars annually during his lifetime, and the remainder of which bonds, to-wit, three hundred and fifty thousand dollars, were to become the sole, free and unrestricted property of his said wife.

That the County Court of Okmulgee County in 1912 appointed a guardian for Jackson Barnett as an incompetent person, which guardian assumed and was on February 1, 1923, assuming to exercize his office, which fact was set forth in the letter of recommendation signed by A. J. Ward,

addressed to the Secretary of the Interior, although it is further alleged that subsequently the Supreme Court of Oklahoma rendered its opinion holding the appointment of said guardian of Barnett void from its inception.

That the action of the Secretary of the Interior in disbursing said funds was based upon the written request of Jackson Barnett (see copy attached to first amended bill, R. 22-25) together with a letter from the Creek national attorney (see R. 25-33) recommending the approval of said request, and a letter from the Commisioner of Indian Affairs containing a recommendation that the Secretary approve said request, all of which instruments were transmitted to the Secretary for his consideration and approval, and that they were so approved and the distribution of said bonds made in accordance therewith, which said recommendation of the Commissioner of Indian Affairs was stamped approved over the signature of the Secretary of the Interior (see R. 50).

Alleging that the delivery of said bonds was made without the knowledge or consent of said guardian or of the County Court of Okmulgee County, Oklahoma, and that the delivery and distribution of said bonds was not for the benefit of said Barnett, and that the delivery of said bonds was made by the Secretary of the Interior without warrant or authority of law (R. 50).

That upon delivery of said bonds to Anna Laura Barnett, wife, she delivered fifteen thousand dollars of the bonds so received to the defendant, Marshall L. Mott, who, it is alleged, had actual knowledge of all the facts as to the

delivery of said bonds to Anna Laura Barnett, and that said bonds had prior thereto been the property of Jackson Barnett, and that said defendant Mott knew said Barnett was a mental incompetent and said funds were trust funds under the jurisdiction of the Secretary of the Interior.

Specifications of Error to Be Urged.

The Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the Secretary of the Interior had no right to dispose of a portion of the restricted trust funds of Barnett, in accordance with written request of Barnett, as a gift *inter vivos* to Anna Laura Barnett, his lawful wife, and that the approval of the Secretary of such disbursement of a portion of his trust funds was without authority of law (R. 71).

2. In holding that the Secretary of the Interior was without authority, under the Act of May 27, 1908 (35 Stat. 312), to unconditionally remove restrictions from trust funds and to release said funds, wholly or in part, to either Barnett or in accordance with Barnett's request (R. 71).

3. In holding that after removal of restrictions by the Secretary, wholly or in part, upon the trust funds and at the request of Barnett, the Secretary of the Interior was under the act, *supra*, required to see that such funds are disbursed "for the benefit of the Indian," and "that he (the Secretary) agree to the disposal thereof" (R. 71).

4. In holding that the exercise by the Secretary of his discretion and judgment as to what portion of Barnett's

trust funds might be disposed of as gifts to his wife, was subject to judicial review.

5. In holding that the action by the Secretary in the approval of Barnett's request, and the transfer of the bonds to Barnett's wife as a gift *inter vivos*, was an arbitrary and unwarranted act (R. 72).

6. In refusing to hold that the acts of the Secretary of the Interior, in the exercise of his discretion and judgment, in the approval of the request of Jackson Barnett for the transfer of said bonds, as a gift *inter vivos* to his wife in the sum of five hundred and fifty thousand dollars, in the absence of any charge of fraud against said official or those charged with the administration of Indian affairs, or any charge of deception practiced upon the Commissioner of Indian Affairs or the Secretary of the Interior as to the facts, was a valid exercise by the Secretary of his discretion and judgment as to the disposal of said funds for the benefit of said Indian, and is not subject to review.

Reasons for Granting the Writ.

In this case a question of federal law construing the Act of May 27, 1908, has been decided, which is in direct conflict with the unanimous opinion of this court in numerous cases, holding that the judgment of the Secretary, free from fraud or deception, unless arbitrarily exercised, is not reviewable by the courts. The opinion of the Circuit Court of Appeals, if allowed to remain the law, makes reviewable in the courts all cases wherein the Secretary of the Interior has removed restrictions from alienation of either land or

trust funds arising therefrom, especially of the Five Civilized Tribes, which is destructive of the heretofore recognized policy of the government in Indian affairs, and of public concern to the holders of titles to Indian lands. The rule announced in the decision is the first pronouncement by a Circuit Court of Appeals questioning the discretionary power of the Secretary of the Interior to supervise the collection, care and disbursement of royalties derived from restricted Indian lands, under leases provided for by Act of May 27, 1908, and to commit to the courts matters pertaining to such lease or the disbursement of such royalties. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals of the Second Circuit, 34 Fed. (2d) 916, and of two United States district judges (see 33 Fed. (2d) 340), touching the power of the Secretary on this identical transaction.

There is now pending in this court cause No. 530, entitled *United States of America* v. *Equitable Trust Company of New York, et al.*, wherein the court will consider at least a portion of the issues involved touching the authority of the Secretary of the Interior, with reference to the transfer to the Equitable Trust Company, as trustee, of five hundred and fifty thousand dollars, approved by the Secretary of the Interior, of the moneys of Jackson Barnett, as referred to in the statement of facts in this cause (R. 48). The cause on appeal by the government as appellant, of necessity affects in part the instant case, and this writ should be granted that the court may have fully and fairly presented the entire issues upon a consolidation

of both cases, which will enable the court to give consideration to the questions involved and settle by its pronouncement the law applicable to all of the Barnett litigation pending now in five different federal courts.

Wherefore, it is respectfully requested that this petition for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit be granted.

CHAS. B. ROGERS,
Attorney for Petitioner.

BRIEF SUPPORTING PETITION.

Opinions of Courts Below.

The opinion of the United States District Court for the Northern District of Oklahoma herein was rendered on the 16th day of May, 1929 (R. 57-59), and is reported in 33 Fed. (2d) 340.

The opinion of Circuit Court of Appeals in said cause was filed January 27, 1930, and no petition for rehearing was filed, and a copy of said opinion is found herein (R. 68-72).

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 3, 1930 (R. 72).

Jurisdiction of this court is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

Statement.

A statement of the questions involved, and of facts charged and issues raised by the proffered second amended bill of the United States and of the errors assigned will be found in the petition.

Statutes and Regulations of Secretary of Interior Involved.

The pertinent provisions of the Act of May 27, 1908, Chapt. 199 (35 Stat. 312), are as follows:

"*Sec. 1.* * * * All allotted lands of full-bloods * * * including minors of such degrees of blood shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April twenty-six, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove restrictions, wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds, for the benefit of the respective Indians as he may prescribe.

"*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent, for a period of not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; * * *".

Chapter 24 of Rules and Regulations of the Secretary of Interior, concerning the collection, control and disbursement of the royalties and income under leases upon restricted lands of Indians, referred to in sections 1 and 2 of the Act of May 27, 1908, aforesaid (Amended Regulations), provides:

"* * * And *provided further,* that in such individual case or class of cases as the Secretary of the Interior may direct, the Superintendent of the Five Civilized Tribes shall cause such payment as may be

authorized to be made out of the royalties and other individual funds of the restricted Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in such cases."

Paragraph 8 of the oil lease of Jackson Barnett, executed under the Rules and Regulations for such, duly promulgated by the Secretary of the Interior, reads as follows:

"This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; *provided, however,* that no regulations made after approval of this lease affecting either the rights of royalty, or payment thereunder, shall operate to affect the terms and conditions of this lease."

The outstanding questions presented by the petition are:

1. Whether the Secretary of the Interior, under said act (May 27, 1908), may unconditionally remove restrictions from the land, or the income derived therefrom held by him under such act and the regulations by him promulgated, and release control and responsibility therefor?

2. Whether the Secretary of the Interior, under the provisions of Act of May 27, 1908, Secs. 1 and 2, Chapt. 199 (35 Stat. 312), can lawfully approve the request of an adult full-blood member of the Creek tribe of Indians to make a gift *inter vivos* to his lawful wife of a portion of his restricted moneys in the hands of said Secretary—derived from royalties under an oil and gas lease, executed by said

Indian on his restricted lands, under the provisions of said act and in accordance with rules and regulations promulgated by the Secretary for such purpose, and providing for the collection, care and disbursement of the proceeds derived from said lease as royalties, and whether said Secretary may lawfully transfer to said wife said fund upon request of said Indian?

3. Whether the discretionary judgment of the Secretary in the disposal of said fund in accordance with the request of said Indian, and free from any charge of fraud on the part of or deception of said officer, is subject to be reviewed and controlled by the courts?

4. Whether the degree of mental competence or incompetence of such restricted Indian, making such request of the Secretary, for the disposal of a portion of his restricted moneys to his wife as a gift, limits, restricts or modifies the authority and power of the Secretary in that behalf?

ARGUMENT.

I.

It is settled that under said Act (1908) the restricted land, and the income derived therefrom in the form of royalties taken under oil leases, are impressed with the same trust character in the hands of and under the control of the Secretary of the Interior.

United States v. *Brown*, 8 Fed. (2d) 564-567, considering the provisions of Act of May 27, 1908, *supra*, said:

> "The act does in terms, however, authorize the making of these leases subject to the approval of the Secretary of the Interior. It must be conceded that the royalties accruing therefrom are lodged with the officers of that department impressed with the same trust as are the lands themselves. *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529; *United States* v. *Hinkle*, (C. C. A.) 261 Fed. 518; *United States* v. *Moore*, (C. C. A.) 284 Fed. 86."

See also,

Parker v. *Richard*, 250 U. S. 235.

Under the provisions of the Act of March 1, 1901, Original Creek Agreement, Sec. 7 (31 Stat. 861), and Act of June 30, 1902, Supplemental Creek Agreement, Sec. 16 (32 Stat. 500), and the provisions of Act of April 26, 1906 (34 Stat. 137), and the Act of May 27, 1908, Secs. 1 and 2 (35 Stat. 312), *supra*, the Secretary of the Interior had authority to remove the restrictions upon the alienation of Jackson Barnett's allotment.

The power of the Secretary to remove restrictions from the lands of Jackson Barnett, under the law has never been denied.

The validity of the oil lease, executed by this Indian upon his restricted land, is confessed in the bill by the allegation of its execution and approval by the Secretary under said regulations, and the resultant accumulation of royalties thereunder.

The Secretary likewise had authority under the regulations to release the funds derived from the royalties under the lease, and dispose of them in accordance with the request of the Indian in the absence of any charge of fraud or arbitrary action.

—*United States* v. *John Hinkle*, 261 Fed. 518;
United States v. *McGugin, et al.*, 28 Fed. (2d) 76-78, with authorities cited;
Parker v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954.

See also opinion of attorney general of October 20, 1926, promulgated by said official for guidance of Department of Justice in the litigation in the various courts, concerning Jackson Barnett's property and affecting this identical transaction. A full copy of that opinion is attached hereto as "Appendix A."

See also extract from opinion of attorney general, dated October 5, 1929, concerning the power and authority of the Secretary of the Interior *to unconditionally remove restrictions from trust funds belonging to individual Indians*, attached hereto as "Appendix B;" also extract from

opinion of solicitor for Interior Department, dated June 26, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians, attached as "Appendix C."

In his opinion of October 20th, 1926, *supra;* the attorney general states two major propositions of law—after asserting that the Secretary did have the authority to approve the lease of Barnett, subject to his regulations *(supra):*

(a) That the Indian, when he executed the lease, gave his consent in advance for the collection, care and disbursement of the royalties by the Secretary, in accordance with said regulations.

(b) That Congress invested the Secretary with power to create said regulations and to determine their necessity, and their effectiveness for the purpose for which they were created—and that Congress saw fit to accomplish its purpose of protection of the Indian—and vested the administration and control in the Secretary of the Interior without specific limitation of the manner in which he might administer, "hence the power so conferred is broader than powers which might have been specifically conferred."

This court, through Justice VAN DEVANTER, in *Parker v. Richard, supra,* construing sections 1 and 2 of Act of May 27, 1908, said:

> "Under the Act of 1908, as already shown, leases of 'restricted land' for oil and gas mining, may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not oth-

erwise.' The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus, the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior *of the collection, care and disbursement of the royalties has not occurred.* * * *

"In the absence of some provision to the contrary, the supervision naturally falls to the Secretary of the Interior. Rev. Stat. 441-463; *United States, ex rel.*, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 721, * * * and see *Catholic* v. *Gibbon*, 158 U. S. 155, 156, 39 L. ed. 931, 936, * * *."

(Reference is then made to the provision for a sale by the heirs subject to the approval of the state court.)

Then the opinion further says:

"There is nothing in the proviso indicating that it is intended in the meantime *to take from the Secretary or to commit to the court* the supervision of matter pertaining to the lease or the royalties. A purpose to do that doubtless will be plainly expressed."

In *United States* v. *Hinkle, supra*, the Eighth Circuit Court of Appeals, construing this same statute, says:

"We are of the opinion, however, that under sections 19 and 20 of the Act of April 26, 1906, and section 2 of the Act of May 27, 1908, and the regulations of the Secretary of the Interior promulgated July 7th, 1906, June 11th, 1907, and April 20th, 1908; the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes, is vested in the Secretary of the Interior, *subject only to such rules and*

regulations as he may prescribe, as an independent trust fund, separate and distinct from the trust estate in the land itself, and the rules and regulations referred to show that the Secretary has elected to administer this trust, and to retain the custody and control of such funds, 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs,' nor did the approval of the County Court affect the matter of mineral rents and profits, as that was a matter beyond his jurisdiction."

II.

Did the Secretary have the authority to approve the request of Barnett to transfer to his wife a portion of his bonds as a gift *inter vivos,* a portion of which bonds was to be placed in trust during the life of Barnett, the income to the extent of $7500.00 per year to be paid to him?

In the absence of any charge of fraud on the part of the officials having to do therewith, it was within the discretionary power of the Secretary, upon the recommendation of the Commissioner of Indian Affairs, to approve said request of Barnett, and to lawfully transfer to Barnett's wife such portion of his bonds, (which, according to the petition, was less than half of his then accumulated bonds and moneys, to say nothing of his lands, which were then (1923) producing over $100,000.00 per year income) a large portion of which bonds were to be by her placed in trust for the use of Barnett during his life.

The determination of what disposition of said funds was "for the benefit of the Indian," was a matter for the Secretary to determine.

See opinion of attorney general, October 20, 1926 (appendix "A" hereto.)

—*Rainbow* v. *Young*, 161 Fed. 835;
Heckman v. *United States*, 56 L. ed. 820;
United States v. *John Hinkle*, *supra*;
Parker v. *Richard*, *supra*.

This authority may be exercised in the absence of specific express authority of Congress.

—*Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026;
United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 587;
Cherokee Nation v. *United States*, 5 Pet. 1;
Parker v. *Richard*, *supra*;
U. S. ex rel. West, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718.

The regulation (24 as amended by the order of October 7, 1922) has the force and effect of law.

—*Bridgeman* v. *United States*, 140 U. S. 577;
United States v. *John Hinkle*, *supra*;
West v. *Hitchcock*, *supra*;
Rainbow v. *Young*, *supra*.

Whether the request of Barnett to deliver to his wife a portion of his trust funds in the hands of the Secretary was for the interest or benefit of Barnett was a question fairly before the Secretary—he determined that in the manner set forth, free from fraud or arbitrary conduct on his part—and its approval was an exercise of his discretionary judgment.

It will be noted that the transfer to the wife of the funds, charged in the bill, was to be "free and unrestricted," except subject to her agreement to place $200,000.00 of the funds in trust during Barnett's life for his use (which was done).

The Circuit Court of Appeals held:

(a). That the Secretary could not unconditionally remove the restrictions from trust property (either land or funds), but must follow the same to see that the proceeds are used "for the benefit of the Indian" allottee.

(b) That the Secretary, under the provisions of law (Act of 1908) could not approve a request of an Indian to transfer a portion of his funds to his wife as a gift *inter vivos*.

Both of said conclusions above are in direct conflict with the cases cited under the foregoing topics discussed, and in direct conflict with the policy which has been uniformly followed by the Indian Department since 1908. Since 1908 many hundreds of cases, in the Five Civilized Tribes, of unconditional removal of restrictions upon the alienation of allotted Indian lands by the Secretary have been granted. Under the opinion of the Circuit Court of Appeals herein, the title to these lands, where conveyed by the Indian, becomes subject to investigation by courts to determine whether the sales thus made were advantageous to the Indian or otherwise, and will entail endless litigation.

Non-Indian citizens of independent character and freedom to act, have considered it a valuable privilege to be-

stow upon the lady who is to become his wife a generous *ante*-nuptial settlement, and likewise, in many cases, gifts *inter vivos* have been made by men to their wives of a liberal portion of their estates. Why this same privilege ceases to have virtue or to receive the commendation of society and the state when applied to a rich Indian whose estate happens to be under the jurisdiction of the Secretary of the Interior, we are unable to understand.

III.

The power of Congress over the Indians is plenary and political, and the exercise of that power is not subject to be controlled by the judicial branch of the Government, and the exercise by the Secretary of the Interior and the Commissioner of Indian Affairs, of an authority, duly delegated by the Congress, is likewise free from judicial control.

—*Lone Wolf* v. *Hitchcock*, 47 L. ed. 299;
United States v. *Richards*, 188 U. S. 432, 47 L. ed. 532;
Heckman v. *United States*, 56 L. ed. 820;
United States v. *Hinkle*, *supra*;
Parker v. *Richard*, 250 U. S. 235.

The last case above cited directly construed the provisions of the Act of May 27, 1908, as to the collection, care and disbursement of the royalties derived from a Creek restricted allotment.

The exercise by said officials of the authority to control the restricted lands and income aforesaid, is not affected by state laws—and the appointment by a state court of a

guardian over such restricted Indian does not affect the authority of the Secretary to control the restricted property.

—*Sperry Oil & Gas Co.* v. *Chisholm, et al.*, 264 U. S. 486, 68 L. ed. 803;

United States v. *Thurston County*, 60 L. ed. 1192;

In re Appeal of Jackson Barnett, 122 Okl. 166;

Opinion of Vice-Chief Justice BRANSON in *Barnett, et al.*, v. *Barnett, et al.*, 121 Okl. 142.

The lack of knowledge on the part of or the consent of the alleged guardian of Barnett or of the County Court having jurisdiction over said guardian, did not affect the validity of said transfer.

IV.

The exercise of discretion and judgment by an executive officer authorized to act, if honestly made, cannot be reviewed upon any issue of fact, without regard to whether said decision is right or wrong in the opinion of other men.

—*Decambra* v. *Rogers*, 189 U. S. 119;

United States, ex rel. Riverside Oil Co., v. *Hitchcock*, 190 U. S. 316;

United States v. *Chemical Foundation, Inc.*, 71 L. ed. 131.

In the absence of fraud, the exercise by a public official of an authority delegated to him by Congress cannot be reviewed by the courts, unless especially authorized by law so to do, and the official acts of such officer are presumed to be regular and he will be presumed to have properly dis-

charged his duty, and the validity of the reasons upon which his judgment and act rests cannot be reviewed by the courts.

—*Confiscation Cases,* 20 Wall. 92-108;
United States v. *Page,* 137 U. S. 673;
Dakota Central Tel. Co. v. *South Dakota,* 250 U. S. 163;
Silberschein v. *United States,* 267 U. S. 222;
United States v. *Chemical Foundation, Inc., supra.*

The proffered second amended bill alleges—that Jackson Barnett is approximately 78 years of age and without issue, and is now and was at the time of the making of the written request to the Secretary to transfer said property to his wife "unable to read or write any language, or to understand elementary arithmetic, or to readily comprehend the English language, nor by reason of his mental infirmity was he able to appreciate the nature or amount of his property, or to realize the portions of it so disposed of and distributed, nor was he, at the times complained of, able to understand, and at no time since has understood, the terms and conditions upon which the said delivery of said bonds was made by the Secretary of the Interior" (R. 49).

In its opinion the Circuit Court of Appeals, after referring to the provisions of sections 1 and 2 of the Act of May 27, 1908, says:

> "These provisions of the act establish Barnett's legal incompetency to manage his own affairs, and so we need give no consideration to the allegations that he was in fact mentally incompetent." (See opinion, R. 70.)

Later in said opinion said court used the following language:

> "In *Barnett* v. *Equitable Trust Co.*, 21 Fed. (2d) 325 (the case now before this court on appeal, No. 530), Judge KNOX ordered that $550,000.00 in bonds held by the trust company, be returned to the Secretary of the Interior." (R. 71)

Judge KNOX in his opinion decided that the transfer of the bonds by the Secretary to the Equitable Trust Company, on the written request of Barnett, was void, not because the Secretary had no authority to remove the restrictions which had been placed upon the property of Barnett, nor because of his lack of authority to approve such gifts and donations of his property as he in fact made, "but such approval, however honest and disinterested it may have been, cannot give validity to a gift or donation which the apparent donor did not make, and which by reason of mental incompetency he was incapable of making." Citing:

> *Jennings* v. *Wood*, 192 Fed. 507;
>
> *Kendall* v. *Ewert*, 259 U. S. 137, 42 S. Ct. 444, 66 L. ed. 862.

The theory of the attorney general on behalf of the government in its second amended bill is that the Secretary of the Interior's action, in transferring said trust funds, was unlawful because of the mental incompetency of the Indian to initiate the request to the Secretary to transfer a portion of his property to his wife, and in that behalf cited in its brief to the court Judge KNOX's decision as authority. The Department of Justice at no time has disputed the authority of the Secretary of the

Interior, under his regulations, to transfer the restricted moneys of an Indian to his lawful wife upon his request, subject to the qualification that the Indian had sufficient mental capacity, as indicated above, that is, to understand the English language and to appreciate the nature and amount of his property and to comprehend elementary arithmetic, and that portion of his property which he attempts to dispose of. Notwithstanding the declaration of the Circuit Court of Appeals that it need give no consideration to the allegations that Barnett was in fact mentally incompetent, the opinion reflects that the conclusion of the court, as to what was for the best interest of Barnett, was influenced by the allegation of mental incompetency, and by the decision of Judge KNOX, *supra*.

Judge KNOX, in his opinion in the New York case, said (see 21 Fed. (2d), p. 332):

> "While he (Barnett) is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. * * *
>
> "In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity."

Neither *Jennings* v. *Wood*, *supra*, nor *Kendall* v. *Ewert*, *supra*, are authority for the conclusions reached by Judge KNOX in the New York case.

The degree of mental capacity of the Indian, who is neither an idiot nor an insane person, certainly cannot limit, restrict or modify the lawful authority of the Secretary of

the Interior to dispose of or disburse the restricted funds derived from oil leases under his regulations aforesaid. What is said in the bill as to the mental capacity of Jackson Barnett, can be said of practically every one of the older full-blood Creek Indians, and a majority of the younger ones, all restricted alike, whether educated or uneducated, and all within what has always been classed as "Congressional Restrictions," without regard to their individual mental capacity.

It was, in every case where the Secretary exercised his discretionary judgment to remove the restrictions from the land, or to release the restricted moneys and disburse them upon the request of the Indian, a necessary element in the question before him, *to consider and determine the mental capacity of the Indian as to the wisdom or unwisdom of the request,* and it was no less an element in the determination of the question of removal of restrictions than the final judgment of the Secretary as to the wisdom of the act. The Indian's judgment as to what disposition of his money should be made, did not determine the action of the Secretary—it was the Secretary's judgment as to the wisdom and propriety of the act which controlled.

Barnett had sufficient mental capacity to execute a valid oil lease on his lands, and the execution of the lease was no less solemn or important in the law than the execution by him of a request to transfer a portion of his bonds to his wife. The lack of capacity to judge of the nature and effect or of the advantageous character of the lease to himself, was compensated for by the interposition of the judg-

ment and experience of the Secretary, and thus the lease, when approved, was for the best interest of the Indian, and likewise Barnett's lack of knowledge of the extent and value of his property and of the effect of his act in transferring to his wife a portion of his bonds, was equally compensated for by the interposition of the judgment and experience of the Secretary in that behalf, and his judgment is no less conclusive in the one case than the other. The determination whether it was for the best interest of the Indian involved a finding of fact.

Approval of Barnett's Request by the Secretary, a Removal of Restrictions Upon the Funds.

It has been repeatedly held by the courts of the United States and of various states where restricted Indians are located, that an approval of a deed by such Indian of his restricted land by the Secretary, where authorized by law, amounts to a specific removal of restrictions upon the sale of the land. The same principle would apply in the present case to the approval by the Secretary of the request of Jackson Barnett and the transfer to his wife of said bonds in accordance therewith, that is, this would amount to a specific order of the Secretary, releasing said moneys from restrictions.

—*United States* v. *Caster*, 271 Pac. 619;
United States v. *Mathewson*, 32 Fed. (2d) 745;
United States v. *DeBell*, 27 Fed. 760;
Dagnett v. *Jenks*, (Kan.) 54 Pac. 136;
Bruno v. *Getzelman*, (Okl.) 118 Pac. 850.

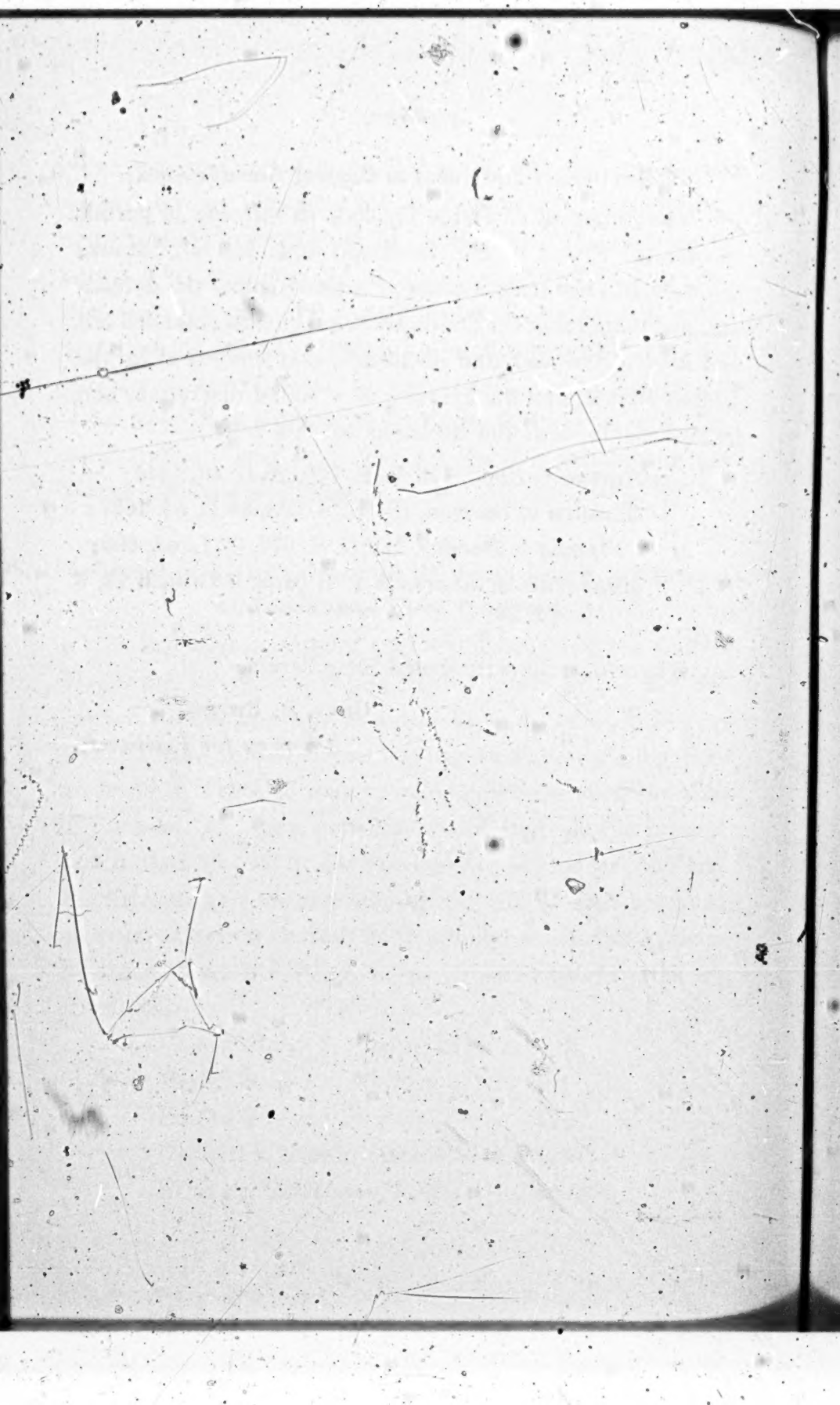
Discretionary Judgment to Control Amendments.

The judgment of Judge POLLOCK in refusing to permit the United States to file its second amended bill because the same did not state a cause of action against the defendant, and dismissing the action because the first amended bill had been abandoned, and its insufficiency confessed by the United States, was the exercise of a sound discretion, and in accordance with the decisions of this court.

—*Hardin* v. *Boyd*, 113 U. S. 756, 28 L. ed. 1141;
Gormley v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1087;
Chapman v. *Barney*, 129 U. S. 677, 32 L. ed. 800;
Mandeville & Jamesson v. *Wilson*, 5 Cranch 13, 3 L. ed. 23.

Wherefore, the writ should issue herein.

CHAS. B. ROGERS,
Attorney for Petitioner.



Appendix "A."

Interior Dept. Received Dec. 14, 1926. Office of the Secretary.

Department of Justice,
Office of the Attorney General.
Washington, D. C.

Hon. Hubert Work,
Secretary of the Interior,
Washington, D. C.

December 11, 1926.

My dear Mr. Secretary: In accordance with your informal request submitted through Assistant Secretary Edwards, there is enclosed herewith copy of the memorandum of October 20, 1926, prepared by Mr. George P. Barse of this department, referred to in a letter of October 22, 1926, sent by me to the United States Attorney in New York City in connection with a suit of *Jackson Barnett* v. *Equitable Trust Company, et al.* The view therein expressed with reference to the amendment of October 7, 1922, of the regulation of the Secretary of the Interior relating to the disposal of proceeds of oil and gas leases of restricted lands of members of the Five Civilized Tribes, is my present view. A copy of the letter of October 22, 1926, and also of a letter of a similar nature, of October 26, 1926, to the United States Attorney in New York, have already been furnished to you by my letter to you of October 26, 1926.

I am sending you by separate mail a reply to your letters of October 4 and November 3, 1926, requesting my opinion as to the authority of the Secretary of the Interior to disburse restricted funds of allottees of the Five Civilized Tribes in cases where guardians of incompetents have been appointed.

Respectfully,

Jno. G. Sargent,
Attorney General.

Inc. 52474

Washington, D. C.,
October 20, 1926.

MEMORANDUM FOR THE ATTORNEY GENERAL.

In re: Question of whether or not the amendment of October 7, 1922, of the regulations of the Secretary of the Interior, relating to disposal of proceeds of oil and gas leases of restricted lands of the members of the Five Civilized Tribes could lawfully be made.

The Amendment of October 7, 1922.

"And *provided further*, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases."

Preliminary Observation.

There appears to be no case in point on this question and therefore it becomes necessary to decide it by a process of reasoning from established principles. This will be done by the statement of a series of basic propositions and the conclusion therefrom derived.

Propositions.

1. *Power and Authority of Congress.* The power and authority of Congress to impose restrictions upon the lands of the Five Civilized Tribes, provide for the removal of those restrictions and the disposal of the proceeds, for the benefit of the Indian, is no longer open to question. The right of exclusive legislation in this respect was reserved in section 1 of the Oklahoma Enabling Act, and was acquiesced

in by the state. The restrictions imposed upon the lands of these Indians was a continuance of the exercise by the United States of its guardianship and protection over the Indians and the issuance of allotments and the granting of citizenship "was in no wise inconsistent with the retention of control *over the disposition of the allotted lands* * * *." *Heckman* v. *United States*, 224 U. S. 413, 436; *Bowling* v. *United States*, 233 U. S. 528.

2. *Action of Congress.* Section 1 of the Act of May 27, 1908, provides that the Secretary may remove restrictions under such terms and conditions as to sale and as to disposal of the proceeds as may be embraced in regulations made by him, *for the benefit of the Indian.*

Section 2 of that act provides for oil and gas leases of these restricted lands under such rules and regulations as may be made by the Secretary of the Interior. Although the latter provision, as to leases, does not specifically state that such rules and regulations shall embrace the control of the disbursement of the moneys thereby derived, yet of course it necessarily follows that such must be part of the purpose of the trust thereby imposed in order that complete protection may be afforded to the Indian lessor. *United States* v. *Brown*, 8 Fed. (2d series) 564.

3. *Nature of Proceeds.* From the foregoing (points 1 and 2, *supra)* it follows:

(a). That the moneys derived from the leasing of restricted lands constitute a *federal* fund, the administration of which is a trust for the benefit of the Indians. *United States* v. *Thurston County*, 143 Fed. 237; *United States* v. *Brown, supra.*

(b) That the State of Oklahoma cannot pass any law interfering in any way with that administration, and that guardians of Indians appointed under state law can neither demand from the federal government the payment to them

of such funds so held, nor in any way direct or dictate their disposal contrary to the will of Congress.

Section 2 of the Act of May 27, 1908, specifically provides, as to the approval of the Secretary of the Interior of oil and gas leases of restricted lands, and the power to make rules and regulations concerning the same, that

> "the jurisdiction of the Probate Courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions * * *"

4. *Procedure Prescribed for Administration.*

(a) It is clear that Congress could have *specifically* indicated the precise disposition of proceeds from the sale or leasing of restricted lands for the benefit of the Indian, and could have directed that said funds be disbursed by the Secretary at a specified sum per month direct to the Indian, or by the Secretary disbursed for the support and maintenance of the Indian in other respects than by payments direct to him, and as to such disbursement it is clear the laws of Oklahoma and the guardians appointed under those laws could have no effect whatever. The existence of guardianship does not prevent the creation of a separate trust, the administration of which is beyond the control of the guardian. There is no necessary conflict.

(b) Congress saw fit to accomplish its purpose of protection of the Indians by creating a trust, by sections 1 and 2 of the Act of 1908, and vested the administration of it in the Secretary of the Interior *without specific limitations* of the manner in which he might administer. Hence, the power so conferred is broader than any powers which might have been specifically conferred.

(c) It follows that the regulations made by the Secretary, in his judgment and discretion in the administration of his trust, the necessity of those regulations, their effectiveness to accomplish their purpose, and his acts in the control and disbursement of said funds in accordance with

said regulations, cannot well be questioned, as indicated by well settled general principles, unless there is an abuse or arbitrary exercise of that discretion. *Wade* v. *Fisher*, 39 App. D. C. 245, 248; *United States, ex rel. Lane*, v. *Sykes*, 49 App. D. C. 48.

5. *Same—Decisions Defining the Secretary's Powers of Administration.*

(Here follow quotations from *United States* v. *Brown, et al., supra*, see same on page 17 of brief; also *United States* v. *Hinkle, supra*, see same, brief, page 20, and *Parker* v. *Richard, supra*, see same, brief, page 19.)

6. *Validity and Purpose of the Amendment of October 7, 1922 to Regulation 24.*

As section 2 of the Act of 1908 specifically grants the Secretary power to make rules and regulations as to oil and gas leases, it follows that the amendment to the rule in question is within his power unless, as already indicated, it constitutes an arbitrary exercise of or abuse of his discretion. (See discussion under point 4.)

It will now be sought to be shown that the amendment is reasonable in purpose and operation and designed to accomplish the true protection of the *cestui que* trust.

(a) The responsibility for the administration of the trust has been placed by Congress upon the Secretary as its agent. *(Wade* v. *Fisher*, 39 App. D. C. 245, 248.) It follows that whether he will delegate a portion of his functions to a state guardian, to some other agency, or exercise it himself, must be a matter solely in his discretion. The responsibility carries with it the accountability.

(b) Experience has demonstrated that abuses in administration of such trust funds sometimes occur where the Secretary surrenders control of the disbursement to a state guardian, and that a course of unvarying delegation of the administration of such trust to the state guardian is

unwise and not for the best interests of the Indian beneficiaries, as was formerly the procedure under Rule 24 prior to its amendment. It is no answer to say that the state guardians are accountable to the state courts. The responsibility for delegating the trust to the state guardian is in the Secretary and he must determine whether or not, in a particular case, he considers it wise to entrust such funds to the appointed guardian.

(c) The amendment does not *preclude* delegation to the state guardian of partial administration of the trust, and does not supersede or repeal original section 24 of the regulations. It supplements section 24, and makes possible a flexible administration, susceptible of rendering the best protection to the interests of the Indian beneficiary. Under section 24 and the amendment, the Secretary may pay reasonable amounts direct to the Indian where exigency or circumstances seem to render it advisable; may disburse funds to other persons for the benefit and immediate use of the Indian; may entrust substantial amounts to the state guardian, with or without restrictive conditions as to disbursement and supervision, and, in a word, exercise direct supervision and administration of his trust, or not, as his best judgment dictates.

Can there be any question under the foregoing observation, as to the reasonableness of purpose and function and operation of the amendment to section 24?

7. Consent of Indian Allottee.

(a) It is clear that under section 2 of the Act of 1908 the Indian has the *option of refusing to lease* his lands if he is not satisfied that the proceeds to be derived therefrom shall be subject to disposal by the Secretary in accordance with the regulations in that connection made by the Secretary, and in the event of such refusal he may retain his lands intact for the restrictive period imposed by Congress, and his rights will not in that event be violated because he still holds his lands and has the use of them.

(b) No disposal of such proceeds is made by the Secretary without the consent of the Indian lessee. Such consent is, as a matter of fact, actually obtained *in advance* by the Secretary before he approves the proffered lease. Every lease executed contains a provision that the lease is made subject to the rules and regulations of the Secretary of the Interior relating to the leasing of said lands. Up until July 7, 1925, the provision inserted in all oil and gas leases was as follows:

> "This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease."

Since that time a similar provision is inserted, which is as follows:

> "*Provided.* During the period supervision hereof is retained by the Secretary of the Interior, this instrument shall be subject to the supervisory regulations of said Secretary."

(c) Where the Indian is *sui juris* he, himself, consents by his signature to the lease, and it will be noted in this connection that section 6 of the Act of 1908 provides for the appointment of representatives of the Secretary of the Interior, whose duties, *inter alia,* shall be "to counsel and advise all allottees, *adult or minor,* having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made * * *."

If the Indian is under guardianship, consent is given by the guardian in executing the lease and by the state court in authorizing the execution of the lease.

(d) Although it has been the custom and practice of the Secretary, purely as a matter of precaution, to incorporate in the lease specific reference to the regulations, and by that reference expressly make the regulations part

of the lease, yet it is believed that such regulations would become part of the lease even though specific reference thereto were not made in the lease. The Indian lessor is, of course, *charged with notice* of the provisions of section 2 of the Act of 1908 to the effect that all leases must be made subject to the rules and regulations of the Secretary. Hence, it follows that the act of making the lease is an adoption of and acquiescence in such regulations as may be made.

With referenc to the rules of the Secretary of the Interior the Supreme Court said in *Caha* v. *United States*, 152 U. S. 211, 222, as follows:

> "Wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

There is thus no legal basis for either the Indian or his guardian, or the state court, to question the regulations, inasmuch as the consent of the Indian to the operation of the regulations attaches in advance, either by express provision in the lease or by implication of law from the fact of execution of the lease.

Conclusion.

I am therefore clearly of the opinion that the amendment of October 7, 1922, to section 24 of the regulations is a valid exercise by the Secretary of the authority conferred upon him by section 2 of the Act of 1908, to make rules and regulations concerning oil and gas leases of restricted Indian lands.

Respectfully submitted,

George P. Barse, Attorney.

Appendix "B."

Extract from opinion of attorney general of October 5, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"* * * Congress, however, has for many years placed supervision over Indians affairs in the Secretary of the Interior, as indicated in the Act of March 3, 1849 (9 Stat. 395), and sections 441 and 463 of the Revised Statutes of 1878. * * * Under these statutes, the Secretary of the Interior was not empowered to consent to the release of the restrictions thus imposed. Later, however, Congress passed statutes which permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior. * * *

"The Secretary has the power to remove restrictions from certain Indians funds. * * * Upon the removal of such restrictions from any fund, and the release of the fund to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with the trust company, I know of no legal objection to his doing so. * * *"

Appendix "C."

Extract from the opinion of the solicitor for the Interior Department, dated June 26, 1929, concerning power of the Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"These all indicate that the Secretary of the Interior stands largely in the capacity of a *quasi* or *de facto* guardian in the protection of restricted Indians and of their property." (c-8)

"* * * the power and duties so resting in the Secretary of the Interior cannot well be transferred or

delegated to any other agency, state or federal. Admittedly, the creation of a trust estate out of restricted Indian funds would lodge in some other tribunal or agency future supervision or control over such funds. From time to time under statutory authority hereinbefore referred to, Congress has authorized the Secretary of the Interior to remove restrictions * * *. When such action is had, Indians so situated can thereafter make such disposition of their property previously restricted, by creation of trust estates, or otherwise, as they may see fit to do. (p. c-9) * * *"

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No. 781

In the Supreme Court of the United States

October Term, 1929.

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Brief Supporting Writ of Certiorari.

CHAS. B. ROGERS,
Tulsa, Oklahoma,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 810

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF SUPPORTING WRIT OF *CERTIORARI.*

Opinions of Courts Below.

The opinion of the United States District Court for the Northern District of Oklahoma herein was rendered on the 16th day of May, 1929 (R. 57-59), and is reported in 33 Fed. (2d) 340.

The opinion of Circuit Court of Appeals in said cause was filed January 27, 1930 (R. 68-72), no petition for rehearing was filed, and a copy of said opinion is found herein.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 3, 1930 (R. 72).

Jurisdiction of this court is invoked under section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

PROCEEDINGS: This action was instituted April 11th, 1928, in the United States District Court for the Northern District of Oklahoma, by the United States against Marshall L. Mott as defendant, to recover and have returned to the United States to be placed in the Department of the Interior, fifteen thousand dollars value of United States bonds, formerly under control of the Secretary of the Interior as restricted funds of Jackson Barnett, an enrolled full-blood, restricted Creek Indian, and to recover interest collected thereon, and for an accounting from the defendant; and, if said bonds cannot be recovered, then for the value thereof.

The dominant theory of the original bill of complaint (not in the record, and the same bill in form as was filed in the District of Columbia, Kansas, and California), is well stated by Judge POLLOCK in his opinion in *United States* v. *McGugin, et al.*, (Kan.) 28 Fed. (2nd) 76, as follows:

> "It is based on the thought, apparently, of the existence of a conspiracy on the part of the now wife of Jackson Barnett, Anna Laura Barnett, through the counsel, machinations and advice of defendants McGugin and Keith to carry said Barnett off and marry him *willy-nilly*—to the end that said conspirators might despoil him of his large wealth for their ultimate benefit and advantage."

The original bill of complaint in this case was, upon motion, dismissed in September, 1928, by the Hon. FRANKLIN E. KENNAMER, District Judge, who adopted the opinion of Judge POLLOCK in the *McGugin* case, *supra*.

On March 4, 1929, Attorney General Sargent approved a report of findings of fact and conclusions of law of Hon. Pierce Butler, Jr., Special Assistant Attorney General, who was specially appointed with the duty of investigating the Barnett transactions and suits, and which report as to the original bill of complaint concludes:

> "The bill sets up all the facts, ultimate and evidentiary, but *does not charge* as a conclusion from them that they show *either fraud and collusion on the part of anyone*, or *lack of authority in the Secretary to make the gifts.*" (Italics ours.)

Thereafter the United States filed its *first* amended bill (R. 1-34) to which appellee filed his motion and a supplemental motion to dismiss (R. 34-36) and later, while said motions were pending, the United States filed its application for leave to file its *second* amended bill. The reasons and grounds of the motion to dismiss were fully considered by the Department of Justice and the insufficiency of the first amended bill conceded.

Thus the Butler report to the Attorney General, *supra*, as to the first amended bill of complaint filed in the *McGugin* case, states:

> "The *essential elements of fraud, conscious deception respecting a material fact, are not in these statements* * * *. That in any suits to recover the dona-

tions, allegations of *fraud* or *imposition upon or collusion with, or deception of,* Government officers, or of the United States cannot be established."

An analysis of the allegation in the proposed substitute leads to the conclusion that the *theory* upon which this second amended bill is drawn is:

That Jackson Barnett, because of his alleged mental weakness and lack of understanding of—"the nature and extent" of his property and—"portions of it so disposed of and distributed," or—"the terms and conditions upon which the said delivery of said bonds was made by the Secretary of the Interior" was without legal capacity—"to make or to initiate the purported disposition and distribution of said bonds"—and for that reason the Secretary of the Interior was without authority of law to so transfer the same.

That the transfer and disposition of said bonds so made by the Secretary—"were not, and at no time have been, for the benefit of Jackson Barnett," and that said transfer and disposition were—"not only without warrant and authority of law, but contrary to the purpose, intent and effect of the law in such case made and provided"—and the defendants, having taken said bonds with full knowledge of the invalidity of said transfer, and without any lawful consideration, and said bonds being the property in law of Jackson Barnett, and being impressed with a trust character—*and the United States, through the Secretary of the Interior, being trustee,* the action lies in the name of the United States against the defendant for the recovery of

said bonds, or their value, together with interest thereon since February 1st, 1923.

The allegations contained in the second amended bill of complaint do not state any new *averment* of fact, but attempt to set forth a cause of action which neither the original nor first amended bill of complaint pleaded, as confessed by the United States in its brief filed in the Circuit Court of Appeals (p. 9) that:

> "The first amended complaint * * * proceeded on the *theory of fraud* * * * practiced on Secretary Fall * * *. The second amended complaint * * * *abandoned the charge of fraud* and tenders * * * the fact of incompetency of Barnett and the question of authority of the Secretary * * *."

In his decision Judge Pollock treated the Government's application for leave to file a second amended bill as an abandonment of its first amended bill and determined against the Government the issue as to the sufficiency of the second amended bill to state a cause of action and dismissed the action. (R. 55-59.)

In the Circuit Court of Appeals the Government in the sixth assignment of error alleged that "the decision, adjudication and decree of said District Court * * * in refusing leave and permission to the * * * United States * * * to file its * * * second amended complaint * * * and in dismissing the cause was an abuse of judicial discretion." (R. 62.)

The Circuit Court of Appeals in its opinion (R. 68-72) at the conclusion thereof, uses the following language:

> "The decree of dismissal is reversed with directions to reinstate the suit, permit appellant to file its

tendered second amended complaint, and give appellee reasonable time within which to file answer."

The opinion determines the questions of the sufficiency of the proffered second amended complaint, and in a trial in the District Court upon said second amended complaint the rules of decision set forth in the opinion challenged in our specifications of error (see petition, pages 9 and 10) become the law of the case. The attorney general, in his memorandum response to petition for the writ in this case (pp. 4-5) under heading "Reasons for Not Opposing the Petition," says:

> "Under ordinary circumstances we should oppose a petition for a writ of *certiorari* in such a case. We do not oppose the granting of the writ in this case because we believe a determination by this court of the questions decided in the court below, will lead to a speedy determination of burdensome litigation, pending in several of the District Courts."

For the foregoing reasons and under the rules of law and procedure laid down by this court in the following cases:

Hardin v. *Boyd,* 113 U. S. 756, 28 L. ed. 1141;
Gormley v. *Bunyan,* 138 U. S. 623, 34 L. ed. 1087;
Chapman v. *Barney,* 129 U. S. 677, 32 L. ed. 800;
Mandeville & Jamesson v. *Wilson,* 5 Cranch 13, 3 L. ed. 23,

it is apparent that the merits of the Government's action, as set forth in its second amended bill, is here for a proper review by this court.

Statement of Facts Alleged in Second Amended Bill.

The facts alleged (R. 46-53) are:

That Jackson Barnett was an adult, enrolled, full-blood member of the Creek Tribe of Indians, about 78 years of age, was allotted and owned lands in said nation in fee, subject only to restrictions against alienation thereof prior to April 26, 1931, and upon which lands in 1912, an oil and gas mining lease (R. 46) was duly executed and approved by the Secretary of the Interior under the provisions of sections 1 and 2 of the Act of May 27, 1908 (35 Stat. 312), pursuant to the regulations promulgated by the Secretary of the Interior relative thereto.

That royalties provided for in said lease had up to February 1st, 1923, accumulated in the hands of the Superintendent of the Five Civilized Tribes to the credit of Jackson Barnett, and subject to the control of the Secretary of the Interior, in the sum of $1,156,750.00. (R. 47-48)

That Jackson Barnett is alleged to be a mental incompetent, illiterate and incapable of managing his affairs and caring for his property and person and to understand the nature and extent of his property, and by reason of his mental infirmity he was unable to realize or understand the portions of his property which he requested to be transferred to his wife as a gift *inter vivos*. (R. 47.)

That on February 1, 1923, the Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs and upon the written request of Jackson Barnett, transferred and delivered to A. J. Ward, Creek Trib-

al Attorney, for the use and benefit of the American Baptist Home Mission Society, in trust, to be delivered to the Equitable Trust Company of New York, as trustee, $550,000.00 face value of bonds, and from the income of which trust fund twenty thousand dollars per year was *to be paid to the Superintendent of the Five Civilized Tribes for the use of said Barnett* during his lifetime (R. 48); and at the same time and as a part of the same transaction, upon the written request of Jackson Barnett, and upon the recommendation of the Commissioner of Indian Affairs said Secretary delivered to and into the hands of Anna Laura Barnett, wife of said Jackson Barnett, United States bonds of the par value of $550,000.00, which were to be the *sole, free and unrestricted* property of said wife, subject to her voluntary agreement to place $200,000.00 of said bonds with the Riggs National Bank as trustee, together with a trust agreement providing that said trust should continue during the life of Jackson Barnett, and providing for the payment to him personally from the income thereof $7500.00 per year, which agreement was kept by the said Anna Laura Barnett, and said trust created. (R. 48-49.)

That the County Court of Okmulgee County in 1912 appointed a guardian for Jackson Barnett as an incompetent person, which guardian assumed and was on February 1, 1923, assuming to exercise his office, which fact was set forth in the letter of recommendation signed by A. J. Ward, addressed to the Secretary of the Interior, although it is further alleged that subsequently the Supreme Court of Oklahoma rendered its opinion holding the appointment of said guardian of Barnett void from its inception. (R. 47)

That the action of the Secretary of the Interior in disbursing said funds was based upon the written request of Jackson Barnett (see copy attached to first amended bill, R. 22-25), together with a letter from the Creek national attorney (see R. 25-33) recommending the approval of said request, and a letter from the Superintendent of the Five Civilized Tribes concurring therein (R. 33) and a letter from the Commissioner of Indian Affairs containing a recommendation that the Secretary approve said request, all of which instruments were transmitted to the Secretary for his consideration and approval, and that they were so approved and the distribution of said bonds made in accordance therewith (see R. 50).

Alleging that the delivery of said bonds was made without the knowledge or consent of said guardian or of the County Court of Okmulgee County, Oklahoma, and that the delivery and distribution of said bonds was not for the benefit of said Barnett, and that the delivery of said bonds was made by the Secretary of the Interior without warrant or authority of law (R. 50).

That upon delivery of said bonds to Anna Laura Barnett, wife, she delivered fifteen thousand dollars of the bonds so received to the defendant, Marshall L. Mott, who, it is alleged, had actual knowledge of all the facts as to the delivery of said bonds to Anna Laura Barnett, and that said bonds had prior thereto been the property of Jackson Barnett, and that said defendant Mott knew said Barnett was a mental incompetent and said funds were trust funds under the jurisdiction of the Secretary of the Interior.

Statutes and Regulations of Secretary of Interior Involved.

The pertinent provisions of the Act of May 27, 1908, Chapt. 199 (35 Stat. 312), are as follows:

> "*Sec. 1.* * * * All allotted lands of full-bloods * * * including minors of such degrees of blood shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April twenty-six, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove restrictions, wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds, for the benefit of the respective Indians as he may prescribe.
>
> "*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent, for a period of not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; * * *."

Chapter 24 of Rules and Regulations of the Secretary of Interior, concerning the collection, control and disbursement of the royalties and income under leases upon restricted lands of Indians, referred to in sections 1 and 2 of

the Act of May 27, 1908, aforesaid (amended regulations), provides:

> "* * * And *provided further*, that in such individual case or class of cases as the Secretary of the Interior may direct, the Superintendent of the Five Civilized Tribes shall cause such payment as may be authorized to be made out of the royalties and other individual funds of the restricted Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in such cases."

Paragraph 8 of the oil lease of Jackson Barnett, executed under the Rules and Regulations for such, duly promulgated by the Secretary of the Interior, reads as follows:

> "This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; *provided, however*, that no regulations made after approval of this lease affecting either the rights of royalty, or payment thereunder, shall operate to affect the terms and conditions of this lease."

Outstanding Questions Presented by the Petition.

1. Whether the Secretary of the Interior, under said act (May 27, 1908, 35 Stat. 312), may unconditionally remove restrictions from the land, or the income derived therefrom held by him under such act and the regulations by him promulgated, and release control and responsibility therefor?

2. Whether the Secretary of the Interior, under the provisions of sections 1 and 2 of said act, can lawfully approve the request of an adult full-blood member of the Creek tribe of Indians to make a gift *inter vivos* to his lawful wife of a portion of his restricted moneys in the hands of said Secretary—derived from royalties under an oil and gas lease, executed by said Indian, on his restricted lands, under the provisions of said act and in accordance with rules and regulations promulgated by the Secretary for such purpose, and providing for the collection, care and disbursement of the proceeds derived from said lease as royalties, and whether said Secretary may lawfully transfer to said wife said fund upon request of said Indian?

3. Whether the discretionary judgment of the Secretary in the disposal of said fund in accordance with the request of said Indian, and free from any charge of fraud on the part of or deception of said officer, is subject to be reviewed and controlled by the courts?

4. Whether the degree of mental competence or incompetence of such restricted Indian, making such request of the Secretary, for the disposal of a portion of his restricted moneys to his wife as a gift, limits, restricts or modifies the authority and power of the Secretary in that behalf?

Specifications of Error to Be Urged.

The Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the Secretary of the Interior had no right to dispose of a portion of the restricted trust funds of Barnett, in accordance with written request of Barnett, as a gift *inter vivos* to Anna Laura Barnett, his lawful wife, and that the approval of the Secretary of such disbursement of a portion of his trust funds was without authority of law (R. 71).

2. In holding that the Secretary of the Interior was without authority, under the Act of May 27, 1908 (35 Stat. 312), to unconditionally remove restrictions from trust funds and to release said funds, wholly or in part, to either Barnett or in accordance with Barnett's request (R. 71).

3. In holding that after removal of restrictions by the Secretary, wholly or in part, upon the trust funds and at the request of Barnett, the Secretary of the Interior was under the act, *supra,* required to see that such funds are disbursed "for the benefit of the Indian," and "that he (the Secretary) agree to the disposal thereof" (R. 71).

4. In holding that the exercise by the Secretary of his discretion and judgment as to what portion of Barnett's trust funds might be disposed of as gifts to his wife, was subject to judicial review.

5. In holding that the action by the Secretary in the approval of Barnett's request and the transfer of the bonds to Barnett's wife as a gift *inter vivos,* was an arbitrary and unwarranted act (R. 72).

6. In refusing to hold that the acts of the Secretary of the Interior, in the exercise of his discretion and judgment,

in the approval of the request of Jackson Barnett for the transfer of said bonds, as a gift *inter vivos* to his wife in the sum of five hundred and fifty thousand dollars, in the absence of any charge of fraud against said official or those charged with the administration of Indian affairs, or any charge of deception practiced upon the Commissioner of Indian Affairs or the Secretary of the Interior as to the facts, was a valid exercise by the Secretary of his discretion and judgment as to the disposal of said funds for the benefit of said Indian, and is not subject to review.

ARGUMENT.

I.

It is settled that under said Act (1908) the restricted land, and the income derived therefrom in the form of royalties taken under oil leases, are impressed with the same trust character in the hands of and under the control of the Secretary of the Interior.

United States v. *Brown*, 8 Fed. (2d) 564-567, considering the provisions of Act of May 27, 1908, *supra*, said:

> "The act does in terms, however, authorize the making of these leases subject to the approval of the Secretary of the Interior. It must be conceded that the royalties accruing therefrom are lodged with the officers of that department impressed with the same trust as are the lands themselves. *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529; *United States* v. *Hinkle*, (C. C. A.) 261 Fed. 518; *United States* v. *Moore*, (C. C. A.) 284 Fed. 86."

See, also,

Parker v. *Richard*, 250 U. S. 235.

Under the provisions of the Act of March 1, 1901, Original Creek Agreement, Sec. 7 (31 Stat. 861), and Act of June 30, 1902, Supplemental Creek Agreement, Sec. 16 (32 Stat. 500), and the provisions of Act of April 26, 1906 (34 Stat. 137), and the Act of May 27, 1908, Secs. 1 and 2 (35 Stat. 312), *supra,* the Secretary of the Interior had authority to remove the restrictions upon the alienation of Jackson Barnett's allotment.

The power of the Secretary to remove restrictions from the lands of Jackson Barnett, under the law has never been denied.

Section 1 of the Act of 1908, provides:

"* * * the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and *disposal of the proceeds* for the benefit of the Indian as he may prescribe. * * *"

No Formality in Removal of Restrictions.

The Circuit Court of Appeals, in its opinion, said:

"He (the Secretary) is given no authority to turn over the property or its proceeds to the Indian. * * *

"Assuming the Secretary had the power to remove restrictions on Barnett's disposition of the bonds as he had to remove restrictions on disposition of his allotment. Still the act further provides * * *. That the Secretary of the Interior was charged with the further duty and authority in the same transaction of seeing that disposal should be made for his benefit."

The Secretary, *when he removes restrictions, of necessity determines it to be for the benefit of the Indian allottee:* The act of removal of restrictions requires no formality. The Secretary by his approval of a deed to the land or of a request for the expenditure of a part or the whole of the restricted funds, removes the restrictions therefrom.

In *Barnett* v. *Equitable Trust Co.*, 21 Fed. (2nd) 325 (Judge KNOX), the court, in effect held that the funds, after the approval by the Secretary of the Interior of the request of Barnett, retained their restricted character, yet the *court* further held that he could make an order disbursing a portion of such funds as attorney's fees. The Court of Appeals reversed the holding by Judge KNOX that the funds were still restricted and held the fund was *"unrestricted"* and *"free funds,"* in the following language:

> "The property remained the Indian's, but he was restrained in its alienation, except as the Secretary might allow; when the Secretary concurred, he (the Indian) was free like another owner to transfer his rights. This applied as well to the proceeds of his land, in this instance, to the royalties arising from a lawful lease, as to the realty itself.
>
> *"When, therefore, Barnett with the Secretary's consent, gave the securities to the Mission, the funds passed to its hands unrestricted and as free funds.* * * *
>
> "We can, therefore, see no reason to say, the court's wings were clipped by *restrictions,* which the *Secretary had lawfully, if improvidently, removed.* * * *." (34 Fed. (2nd) 916.) (Italics ours.)

There is a clear distinction between the absolute release of all control or authority over the bonds delivered

to Mrs. Barnett (as alleged in the second amended bill), and a reservation in the trust agreement, executed by the American Baptist Home Mission Society and Barnett, with the Equitable Trust Company as to that donation, wherein the income from said trust fund to the extent of $20,000.00 per annum was required to be paid by the trustee into the hands of the Superintendent of the Five Civilized Tribes, as appears from said trust agreement. The Secretary did retain control and authority over a portion of the income from said bonds. This was not true in the gift to Mrs. Barnett. The act of approval by the Secretary, and the delivery to the wife, constituted a removal of restrictions and made the transfer complete.

This view is consonant with the views of Solicitor Finney in his opinion of June 26, 1929 (Appendix C) (p. 84 hereof); and the opinion of Attorney General Mitchell of October 5th, 1929 (Appendix B) (p. 83 hereof).

When the Secretary approved the request of Barnett to transfer a portion of his restricted funds, to his lawful wife, it was an adjudication of Barnett's competency, which he was authorized to determine, and that all restrictions upon the funds thus disbursed were removed.

The approval by the Secretary of a conveyance, is a removal of restrictions of the right to alienate his land.

In *Dagnett* v. *Jenks*, (Kan.) 54 Pac. 136, the court says:

> "Under the patent to Edward Dagnett, the land was vested in him, subject to the restrictions contained therein; that the conveyance * * * having been approved

by the Secretary of the Interior, divested the title of the United States therein, and placed the title outside of the restrictions upon the sale of Indian lands."

In *United States* v. *Mathewson*, 32 Fed. (2d) 745, the court said:

"By this portion of the statute the Secretary of the Interior was given the right to remove the restrictions from this land, and, in his approval of the deed, he did remove the restrictions."

In *Ingraham* v. *Ward*, 44 Pac. (Kan.) 16, the court says:

"Neither the treaty nor the Act of Congress expressly provides any conditions or limitations, restrictions or guards, and hence the matter of *consent and approval* rested in the discretion and power of the Secretary. * * * when he acts and approves, the transfer is complete and the conveyance valid. * * *"

In *Bruno* v. *Getzelman*, (Okla.) 118 Pac. 350, the court says:

"It therefore follows that the plaintiff, having conveyed the lands by the approval of the Secretary of the Interior, the Indian title was thereby extinguished, and the grantee held said lands free from any restrictions upon alienation."

In *United States* v. *DeBell*, 227 Fed. 760, Judge SANBORN, speaking for the court, says:

"The United States, by its Acts of Congress, empowered the Secretary of the Interior to consider and determine whether or not Pehinji was competent and capable to manage his own affairs, and empowered him, if he found that he was so competent, to issue

to him a patent in fee simple, and the Congress enacted that if he did so, all restrictions upon the sale and conveyance by Pehinji of this land were removed. The Secretary so found, and issued the patent. This patent in itself constituted a conveyance of the complete title to the land, and an adjudication that all restrictions upon the sale and conveyance thereof by the patentee were removed."

In re Jessie's Heirs, 259 Fed. 694, it was said:

"The restrictions may be removed upon the approval of a conveyance. The necessary act is the *concurrence of the Secretary in the transfer, and his assent and approval thereto.*"

Oil and Gas Lease Executed by Jackson Barnett Was Valid When Approved by the Secretary.

The oil and gas mining lease referred to in the proffered second amended bill appears in full on pages 14 to 18 of the record in No. 530, *United States of America* v. *Equitable Trust Company of New York, et al.*, in this court, and has been repeatedly referred to in the various suits involving the Barnett transactions here involved. The opinions of the attorney general of October 20, 1926, set out as Appendix "A" to this brief (page 75), and of March 4, 1929, the Butler opinion hereinbefore referred to, declare the oil and gas mining lease of Jackson Barnett, which was executed by him *sui juris* March 5, 1912, valid. Neither of said opinions are published in the official opinions of the attorney general.

In his report touching the validity of the oil lease of Jackson Barnett, among other things, Mr. Butler said:

"The lease of Barnett was approved by the Secretary and therefore valid whether Barnett was competent or incompetent. The regulations of the Secretary control such leases, and the leases incorporate the regulations then in effect and thereafter to be made." (Italics ours.)

The validity of the oil lease, executed by this Indian upon his restricted land, is confessed in the bill by the allegation of its execution and approval by the Secretary under said regulations, and the resultant accumulation of royalties thereunder.

The Secretary likewise had authority under the regulations to release the funds derived from the royalties under the lease, and dispose of them in accordance with the request of the Indian in the absence of any charge of fraud or arbitrary action.

—*United States* v. *John Hinkle*, 261 Fed. 518;
United States v. *McGugin, et al.*, 28 Fed. (2d) 76-78, with authorities cited;
Parker v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954.

See also opinion of attorney general of October 20, 1926, *supra*, promulgated by said official for guidance of Department of Justice in the litigation in the various courts, concerning Jackson Barnett's property and affecting this identical transaction. A full copy of that opinion is attached hereto as "Appendix A" (page 75). (Opinion not published.)

See also extract from opinion of attorney general, dated October 5, 1929, concerning the power and authority of

the Secretary of the Interior *to unconditionally remove restrictions from trust funds belonging to individual Indians*, attached hereto as "Appendix B" (page 83); also extract from opinion of solicitor for Interior Department, dated June 26, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians, attached as "Appendix C" (page 84). (Opinion not published.)

In his opinion of October 20th, 1926, *supra*, the attorney general states two major propositions of law—after asserting that the Secretary did have the authority to approve the lease of Barnett, subject to his regulations *(supra)*:

(a) That the Indian, when he executed the lease gave his consent in advance for the collection, care and disbursement of the royalties by the Secretary, in accordance with said regulations.

(b) That Congress invested the Secretary with power to create said regulations and to determine their necessity, and their effectiveness for the purpose for which they were created—and that Congress saw fit to accomplish its purpose of protection of the Indian—and vested the administration and control in the Secretary of the Interior without specific limitation of the manner in which he might administer, "hence the power so conferred is broader than powers which might have been specifically conferred."

This court, in *Parker* v. *Richard*, *supra*, construing sections 1 and 2 of Act of May 27, 1908, said:

"Under the Act of 1908, as already shown, leases

of 'restricted land' for oil and gas mining, may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not otherwise.' The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus, the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior *of the collection, care and disbursement of the royalties has not occurred.* * * *

"In the absence of some provision to the contrary, the supervision naturally falls to the Secretary of the Interior. Rev. Stat. 441-463; *United States, ex rel.*, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 721, * * *; *Catholic* v. *Gibbon*, 158 U. S. 155, 156, 39 L. ed. 931, 936, * * *."

The opinion further says:

"There is nothing in the proviso indicating that it is intended in the meantime *to take from the Secretary or to commit to the court* the supervision of matter pertaining to the lease or the royalties. A purpose to do that doubtless will be plainly expressed." (Italics ours.)

In *United States* v. *Hinkle, supra*, the Eighth Circuit Court of Appeals, construing the same statute, says:

"We are of the opinion, however, that under sections 19 and 20 of the Act of April 26, 1906, and section 2 of the Act of May 27, 1908, and the regulations of the Secretary of the Interior promulgated July 7th, 1906, June 11th, 1907, and April 20th, 1908, the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes, is vested in the Secretary of the Interior, *subject only to such rules and regulations as he may prescribe*, as an independent trust fund, separate and distinct from the trust estate

in the land itself, and the rules and regulations referred to show that the Secretary has elected to administer this trust, and to retain the custody and control of such funds, 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs' (nor did the approval of the County Court affect the matter of mineral rents and profits, as that was a matter beyond his jurisdiction)."

No better statement of the true principle governing this case could be made than the language of Judge POLLOCK in the instant case, 33 Fed. (2d) 341:

"That the Secretary of the Interior, holding the property derived from accumulated royalties in his hands in trust for the incompetent full-blood Creek Indian Jackson Barnett, had full power and authority to make the distribution he did in this case, and to bind the government thereto, is settled by adjudications binding here. See *Parker* v. *Richard*, 250 U. S. 236, 39 Sup. Ct. 442, 63 L. ed. 954; *United States* v. *Hinkle*, (C. C. A.) 261 Fed. 518, and many cases cited."

II.

Did the Secretary have the authority to approve the request of Barnett to transfer to his wife a portion of his bonds as a gift *inter vivos*, a portion of which bonds was to be placed in trust during the life of Barnett, the income to the extent of $7500.00 per year to be paid to him?

In the absence of any charge of fraud on the part of the officials having to do therewith, as in this case, it was within the discretionary power of the Secretary, upon the recommendation of the Commissioner of Indian Affairs, to approve said request of Barnett, and to lawfully transfer to

Barnett's wife such portion of his bonds, (which, according to the petition, was less than half of his then accumulated bonds and moneys, to say nothing of his lands, which were then (1923) producing over $60,000 per year income) a large portion of which bonds were to be by her placed in trust for the use of Barnett during his life.

The determination of what disposition of said funds was "for the benefit of the Indian," was a matter within the exclusive jurisdiction of the Secretary.

See opinion of attorney general, October 20, 1926 (appendix "A" hereto; page 75).

—*Rainbow* v. *Young*, 161 Fed. 835;
Heckman v. *United States*, 56 L. ed. 820;
United States v. *John Hinkle, supra;*
Parker v. *Richard, supra.*

It is apparent in the concrete discussions of this case under review by the Circuit Court of Appeals and in the decision by Judge Knox and in the various briefs by the Department of Justice and especially in the opinion by Mr. Pierce Butler, special assistant to the Attorney General, that the conclusions reached that the action of the Secretary in approving the donations of Barnett, and the trust agreements concerning the same was unlawful, was because there was no specific express authority granted him by Congress so to do.

This authority may be exercised in the absence of specific express authority of Congress.

—*Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026;

United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 587;
Cherokee Nation v. *United States*, 5 Pet. 1;
Parker v. *Richard*, *supra*;
U. S., ex rel. West, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718.

Administrative Jurisdiction Is Discretionary.

In the exercise of the supervision and control of the Indian wards of the government, the Secretary of the Interior and Commissioner of Indian Affairs are charged by law, with the duty of acting as custodians of their property. Congress has given to these officers certain supervisory authority, and under this authority they have duties to perform which are not definitely defined and minutely expressed by statutes.

In *United States* v. *McDaniel*, 7 Peters 1-14, 8 L. ed. 587, it was said:

> "A practical knowledge of any one of the great departments of the government, must *convince* every person that the head of a department, in the distribution of its duties and responsibilities is often compelled to *exercise* his *discretion*. He is limited in the exercise of his powers by the law, but it *does not follow* that he must *show a statutory provision for everything he does*. No government could be administered upon such principles." (Italics ours.)

In re Neagle, 39 Fed. 860, Judge SAWYER, in citing the case, *supra*, said:

> "Neither constitution nor statutes can or do anticipate or point out, specifically, every possible right or

duty to be covered and secured. They must necessarily be general."

This court in *McKnight* v. *United States Land Association*, 142 U. S. 161-181, 35 L. ed. 980, said:

"The general words of those sections are not supposed to particularize every minute duty devolving upon the Secretary and every special power bestowed upon him. There must be some latitude of construction. In the language of this court in *Williams* v. *United States*, 138 U. S. 514 (34 L. ed. 1026), 'It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the * * * department, matters not foreseen, equities not anticipated, and, which therefore are not provided for by express statutes, may sometimes arise and therefore the Secretary of the Interior is given that *extending and supervisory power* which *will* enable him, in the face of these unexpected contingencies to do justice.

"The same remarks apply to the powers of the Secretary of the Interior, under a similarly worded section of the Revised Statutes (Sec. 463) to supervise and control the management of the Bureau of Indian Affairs which powers, so far as we are advised, have never been questioned." (Italics ours.)

In *Rainbow* v. *Young, supra*, the court quoted from Revised Statutes, aforesaid, and commented thereon, as follows:

"In our opinion the very language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the Pres-

ident and Secretary of Interior, to manage all Indian relations with a just regard, * * * to the rights and welfare of the Indian and to the duty or care of protection owing to them by reason of their state of dependency and tutelage."

The regulation (24 as amended by the order of October 7, 1922) has the force and effect of law.

In *Wilcox* v. *Jackson*, 13th Pet. 513, 10 L. ed. 1214, this court said:

"* * * The President speaks and acts through the heads of the several departments in relation to subjects which pertain to their respective duties.

"Thus, it is the especial law of this government that in Indian Affairs, when the Commissioner of Indian Affairs acts, and his action is approved by the Secretary, it becomes the action of the President of the United States."

In *Northern Pacific Ry. Co.* v. *Mitchell*, 208 Fed. 469, it is said:

"The President may act through the heads of the different departments, and when the head of a department acts, it will be presumed, in the absence of evidence to the contrary, that he acted by direction of the President."

Thus, under R. S. (Sec. 465; U. S. C. A., Vol. 25, Sec. 2) the regulation formulated and approved by the Commissioner of Indian Affairs and the Secretary with reference to the disposal of the proceeds of the lease of a restricted Indian had the force and effect of law.

—Bridgeman v. *U. S.*, 229 U. S. 577;

U. S. v. *John Hinkle, (supra);*

Parker v. *Richard, (supra);*
U. S. v. *McDaniel, (supra);*
West v. *Hitchcock,* 51 L. ed. 718;
Rainbow v. *Young, (supra);*
Brader-James v. *U. S.,* 241 U. S. 591;
Blansett v. *Cardin,* 261 Fed. 309.

The attorney general in the opinion of October 20, 1926, concerning the validity of the amended regulation of October 7, 1926, concurred in the views as to the power of the Secretary to make rules, as follows:

"It follows that the regulations made by the Secretary in his judgment and discretion in the administration of his trust, *the necessity of those regulations, their effectiveness to accomplish their purpose,* and his acts in *control* and *disbursement* of said funds, in accordance with said regulations, *cannot well be questioned,* as indicated by well settled general principles."

—*Wade* v. *Fisher,* 29 App. D. C. 245, 248;
United States, ex rel. Lane, v. *Sykes,* 49 App. D. C.

"I am therefore clearly of the opinion that the amendment of October 7, 1922, to section 24 of the regulations is a valid exercise by the Secretary of the authority conferred upon him by Section 2 of the Act of 1908 to make rules and regulations concerning oil and gas leases of restricted Indian lands." (Italics ours.)

Under said regulations the Secretary and the Commissioner of Indian Affairs were undoubtedly vested with authority to construe said regulations in the manner and form that they intended it to apply.

In the case of *Work, Secretary of the Interior,* v. *United States, ex rel. Rives,* decided March 22, 1925 (267 U. S. 175), this court said:

> "*Ness* v. *Fisher,* 223 U. S. 683; *Riverside Oil Company* v. *Hitchcock,* 190 U. S. 316; *Alaska Smokeless Company* v. *Land,* 230 U. S. 549; and *Hall* v. *Payne,* 254 U. S. 343, * * * held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, *no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary.* * * * and the mere fact that the court might deem the ruling *erroneous in law gave it no power to intervene.* These cases are supported by earlier authorities to the same effect. *United States, ex rel. Tucker,* v. *Seaman,* 17 How. 225; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register,* 9 Wall. 575; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40. All rest upon the *Decatur* case." (Italics ours.)

It is not contended by the United States in the case at bar that the acts of the Secretary were either "*capricious or arbitrary*" in approving the donation.

In *United States, ex rel. Ness,* v. *Fisher,* 223 U. S. 683, this court said:

> "So, at the outset, we are confronted with the question, not whether the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the exercise of judgment or discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own, and not having his approval. The question is not new but has been often

considered by this court and, uniformly answered in the negative * * *."

In *Decatur* v. *Paulding*, 14 Pet. 497, the court said:

"The duty required by the resolution was to be performed by him as the head of one of the executive departments, in the ordinary discharge of his official duties. In general, such duties, whether imposed by Act of Congress or by resolution, are *not mere ministerial duties*. The head of an executive department of the government, in the *administration of the various and important concerns of his office*, is continually required to *exercise his judgment* in expounding the laws and resolutions of Congress, under which he is from time to time required to act. * * * *But their* (the Department's) *judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the Act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries nor revise his judgment in any case where the law authorized him to exercise his judgment or discretion. * * * The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.* * *" (Italics ours.)

Departmental Construction of the Act of May 27, 1908.

Departmental construction may be examined as an assistant if not a criterion of the meaning and purpose of the act, and ordinarily controls the construction of the stat-

ute by the courts. This rule of construction is given added force from the provisions of the act which authorizes the Secretary of the Interior to make rules and regulations to carry out the purpose of the act.

In *Jacobs* v. *Prichard*, 223 U. S. 200 (56 L. ed.), it was said:

> "It is to be noted that all the proceedings are under the control of the Secretary of the Interior, and that any irregularity in them or improvidence in the consents can be corrected by him."

In *United States* v. *Moore*, 95 U. S. 763, 24 L. ed. 588, the court said:

> "The construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."
>
> —*Edwards* v. *Darby*, 12 Wheat. 210;
>
> *United States* v. *State Bank North Carolina*, 6 Pet. 29;
>
> *United States* v. *McDaniel*, *supra*.

In *United States* v. *Alabama Ry.*, 142 U. S. 621, 35 L. ed. 1134, the court held:

> "The contemporaneous construction thus given by the executive department of the government * * * should be considered as decisive of this suit."

The Department of the Interior throughout its administration of the act, *supra*, has consistently followed the uniform construction that the authority to disburse restricted funds was lodged in the Secretary of the Interior.

Opinion of Solicitor Mahaffie, June 12, 1917, as to authority of the Secretary to make investment of funds in purchase of bonds without the knowledge, consent or request of Barnett.

Opinion, James C. Davis, National Creek Attorney, February 24, 1920, holding:

> "In my opinion it is the law of the case * * * that if the Secretary * * * concludes and determines * * * that Jackson Barnett is possessed of mental capacity sufficient to enable him reasonably to understand its nature and purpose, then the Secretary is authorized by law to approve the same and set apart from the restricted funds * * * such sum as may be required for a compliance therewith, * * *."

Opinion, Solicitor Mahaffie, March 11, 1921, that:

> "The duty of thus protecting the interest of this full-blood Indian heir falls upon you, and I am of the opinion that royalties accruing from these lands are payable to such person as you may designate."

Opinion of A. J. Ward, National Creek Attorney, to the same effect as Creek Attorney Davis.

Opinion of solicitor approved by Secretary Fall, September 6, 1922, which as to removal of restrictions, held:

> "He may, in his discretion as seems best, pay the moneys to the allottee or he may disburse it on behalf of and in the interest of the * * * ward."

Opinion of Solicitor E. O. Patterson, of October 24, 1926, said:

> "The authority to administer such restricted funds

of necessity carries with it the absolute right to determine the method of administration."

Opinion of Solicitor E. C. Finney, of June 26, 1929, that:

"Congress has authorized the Secretary of the Interior to remove restrictions or issue certificates of competency to the Indians * * *. When such action is had, Indians so situated can thereafter make such disposition of their property, previously restricted by creation of trust estates, or otherwise, as they may see fit to do."

The opinions of the Department of Justice sustain and confirm the Departmental construction as to the Act of 1908, *supra.*

Opinion of Attorney General of October 20, 1926, said:

"Congress saw fit to accomplish its purpose of protection of the Indians by creating a trust, and vested the administration of it in the Secretary of the Interior *without specific limitations of the manner in which he might administer. Hence, the power so conferred is broader than any powers which might have been specifically conferred* * * *." (Italics ours.)

Opinion of Attorney General Mitchell of October 5, 1929, that:

"The Secretary has the power to remove restrictions from certain Indian funds. Upon the removal of such restrictions from any fund, and the release of the fund to the Indian, the *Indian may use the fund as he sees fit.*"

Opinion of the Comptroller General of the United States on the right of the Secretary of the Interior to pay out re-

stricted Indian funds coming into his hands (Vol. 22, Comp. Opins., p. 620):

> "* * * As to the sale and lease of the restricted lands under consideration, and the disposal of the proceeds of such sales or leases for the benefit of the restricted Indians, the above quoted statutory provisions seem to invest the Secretary of the Interior with superior jurisdiction in formulating and enforcing rules and regulations for sales or leases, or the disposal of the proceeds thereof.
>
> "Such view is emphasized by the second proviso of Section 2, making the jurisdiction of the Probate Courts of the State of Oklahoma subject to the foregoing provisions as to leases; that may be made with the approval of the Secretary of the Interior, 'and not otherwise.' * * *"

The action of the Secretary was in conformity with the well settled rule of construction of the Department of the Interior.

Whether the request of Barnett to deliver to his wife a portion of his trust funds in the hands of the Secretary was for the benefit of Barnett was a question fairly before the Secretary—he determined that question in the manner set forth, free from fraud or arbitrary conduct on his part—and its approval was an exercise of his discretionary judgment.

It will be noted that the transfer to the wife of the funds, charged in the bill, was to be "free and unrestricted," except subject to her voluntary agreement to place

$200,000.00 of the funds in trust during Barnett's life for his use (which was done).

The Circuit Court of Appeals held:

(a) That the Secretary could not unconditionally remove the restrictions from trust property (either land or funds), but must follow the same to see that the proceeds are used "for the benefit of the Indian" allottee.

(b) That the Secretary, under the provisions of law (Act of 1908) could not approve a request of an Indian to transfer a portion of his funds to his wife as a gift *inter vivos*.

Both of said conclusions above are in direct conflict with the cases cited and with the policy of the Interior Department since 1908. Many hundreds of cases, in the Five Civilized Tribes, of unconditional removal of restrictions upon the alienation of allotted Indian lands by the Secretary have been granted. Under the opinion of the Circuit Court of Appeals herein, the title to these lands, becomes subject to investigation by courts to determine whether the sales thus made were advantageous to the Indian, and will entail endless litigation.

Non-Indian citizens have considered it a valuable privilege to bestow upon their wives gifts *inter vivos* of a liberal portion of their estates. Why this privilege ceases to have virtue and receive commendation when applied to a rich Indian whose estate happens to be under the jurisdiction of the Secretary of the Interior, we are unable to understand.

Is it to be said that such a gift by an Indian is not for his benefit, or that he "loots" his estate by a gift to his wife of less than the succession laws of Oklahoma give to her on the death of her husband?

Indian May Dispose of His Estate by Will.

Section 23 of the Act of April 26, 1906 (34 Stat. 137), provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein * * *."

Congress by this Act authorized the Indian to dispose of his estate on the same footing as any other citizen, notwithstanding restrictions against alienation.

—*In re Tiger*, 94 Okl. 103;
Bundell v. *Wallace*, 267 U. S. 373.

If the Indian is to be permitted to alienate his property, in accordance with his wishes, after death, under what logic can it be said that he shall not, with the approval of the Secretary of the Interior, be permitted to dispose of a portion of his funds during his life?

Hon. Jas. C. Davis, Creek Tribal Attorney (Feb. 24, 1920), in an opinion upon the question of gifts by Barnett to various churches and institutions (administration of Cato Sells, Com. of Indian Affairs), used the following language:

"If an Indian has a sufficient understanding to determine the disposition of his property after death, the same Indian will necessarily have an equal understanding of the nature of a gift which he proposes to make during his life time." (Not officially reported. See Burke's testimony before Senate Indian Committee, *infra.)*

III.

The power of Congress over the Indians is plenary and political, and the exercise of that power is not subject to be controlled by the judicial branch of the Government, and the exercise by the Secretary of the Interior and the Commissioner of Indian Affairs, of an authority, duly delegated by the Congress, is likewise free from judicial control.

—*Lone Wolf* v. *Hitchcock,* 47 L. ed. 299;
United States v. *Rickert,* 188 U. S. 432, 47 L. ed. 532;
Heckman v. *United States,* 56 L. ed. 820;
United States v. *Hinkle, supra;*
Parker v. *Richard, supra.*

The last case above cited directly construed the provisions of the Act of May 27, 1908, as to the collection, care and disbursement of the royalties derived from a Creek restricted allotment.

Power of Congress, Plenary and Political.

In *Lone Wolf* v. *Hitchcock*, 47 L. ed. 299, the Supreme Court says:

> "Plenary authority over the tribal relations of the Indians has been exercised by the Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

In speaking of the relation of the Indian to the government, as represented by the Department of the Interior in *Heckman* v. *United States*, 56 L. ed. 208, the court said:

> "It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty."

In the consideration of questions pertaining to the *alienation*, or limitation upon the power to alienate, or to the control of the property of restricted Indians, the rules of law applicable to white persons have no application.

Thus in *Goodrum* v. *Buffalo*, 62 Fed. 817, the court used the following language:

> "The common-law rule relative to power of alienation or limitation upon that power do not apply in the relations of the federal government with the Indians and their property."

And again in *Heckman* v. *United States, supra* (page 445), in speaking of the representation by the United States of the interests of the Indian:

"Its efficacy does not depend upon the Indian's acquiescence. Nor does it rest upon convention, *nor is it circumscribed by rules which govern private relations.* * * *"

The exercise by said officials of the authority to control the restricted lands and income aforesaid, is not affected by state laws—and the appointment by a state court of a guardian over such restricted Indian does not affect the authority of the Secretary to control the restricted property.

—*Sperry Oil & Gas Co.* v. *Chisholm, et al.*, 264 U. S. 486, 68 L. ed. 803;

United States v. *Thurston County*, 60 L. ed 1192;

In re Appeal of Jackson Barnett, 122 Okl. 166;

Opinion of Vice Chief Justice BRANSON in *Barnett, et al.*, v. *Barnett, et al.*, 121 Okl. 142.

Thus, in *Sperry Oil & Gas Co.* v. *Chisholm, et al., supra*, quoting from syllabus:

"4. Neither the constitution of a state nor any of its statutes, whatever rights they may confer on Indians or withhold from them, can withdraw them from the operation of an Act of Congress concerning them, passed in the exercise of its paramount authority."

In *Barnett* v. *Barnett*, 121 Okl. 142, Vice-Chief Justice BRANSON, as to the amended regulations of October 7, 1922, says:

"The regulation of 1922 *(supra)* was such a regulation as the officers of this state must respect. If the mental competency of this ward to initiate the donation

was questioned, *it was within the quasi judicial power of the Secretary of the Interior to pass on the same,* and ascertain whether he was of disposing mind; this is a power necessarily given him in performing the duties as to such Indians imposed by Congress. He passed on that in approving the request of the Indian. By his act, the legal and equitable title to the bonds in question passed, subject only to the trust agreements, and no state agency has any authority to interfere with such executed transaction."

And further in said opinion, he says:

"No court of this state, and no officer of such court has any concern with the restricted property of Jackson Barnett, in the hands of the Secretary of the Interior, nor has such court or officer any right to pursue a course the object of which is to defeat the disposition of such property, which the Secretary of the Interior has seen fit to make, at the request of the ward of the government."

Supreme Court of Oklahoma, *in re Appeal of Jackson Barnett*, 122 Okl. 160, attacking the validity of the order entered April 29, 1912, appointing a guardian over the person and estate of Jackson Barnett, reference to which is made in the second amended complaint of the United States in this cause, held said appointment void.

In the opinion it was stated:

"We must conclude that the judgment of the District Court of June 24th, reversing the County Court and decreeing that there was no valid appointment of Carl J. O.Hornett as guardian of Jackson Barnett, has, ever since its entry, been of full force and effect as a substitute for the judgment of the County Court. * * *

"The appointment of said E. S. Bailey as guardian of Jackson Barnett being made without any notice whatever can be of no more validity than the original appointment of Carl J. O'Hornett."

The lack of knowledge on the part of or the consent of the alleged guardian of Barnett or of the County Court having jurisdiction over said guardian, did not affect the validity of said transfer.

IV.

The exercise of discretion and judgment by an executive officer authorized to act, if honestly made, cannot be reviewed upon any issue of fact, without regard to whether said decision is right or wrong in the opinion of other men.

DeCambra v. *Rogers*, 189 U. S. 119;

United States, ex rel. Riverside Oil Co., v. *Hitchcock*, 190 U. S. 316;

Lee v. *Johnson*, 115 U. S. 48, 29 L. ed. 570;

Steel v. *Smelting Co.*, 106 U. S. 447;

United States v. *Chemical Foundation, Inc.*, 272 U. S. 1, 71 L. ed. 1;

Silberschein v. *United States*, 266 U. S. 222.

In the absence of fraud, the exercise by a public official of an authority delegated to him by Congress cannot be reviewed by the courts, unless especially authorized by law so to do, and the official acts of such officer are presumed to be regular and he will be presumed to have properly dis-

charged his duty, and the validity of the reasons upon which his judgment and act rests cannot be reviewed by the courts

—*Confiscation Cases*, 20 Wall. 92-108;
United States v. *Page*, 137 U. S. 673;
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163;
Silberschein v. *United States*, *supra*;
United States v. *Chemical Foundation, Inc.*, *supra*;
Tidal Oil Co. v. *West, Secretary*, 30 Fed. (2nd) 137;
Wilbur, Sec., v. *United States, ex rel. Kadrie*, 74 L. ed. 433 (Adv. Sheet 1929, No. 10);
United States, ex rel. West, v. *Hitchcock*, 205 U. S. 80;
United States v. *Hitchcock*, 190 U. S. 316;
Seymour v. *S. Carolina*, 2 Dist. C. App. 240.

The determination whether it was for the best interest of the Indian involved findings of fact, and the exercise of discretion and judgment thereon.

In *DeCambra* v. *Rogers*, *supra*, the court said:

"It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

In *United States, ex rel. West*, v. *Hitchcock*, *supra*, the court said:

"There is no provision for a re-examination by the courts of the question of fact so committed by him for decision, and, construing the nature of the question, the

plenary power of Congress in the matter, and the obvious difficulties in the way of such a re-examination, we think it is intended that there shall be none."

In *Lee* v. *Johnson, supra,* the court said:

"The findings of the Secretary * * * must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the Department, *upon matters of fact cognizable by it* has been expressly affirmed." * * *" (Italics ours.)

In *Steel* v. *Smelting Company, supra,* the court, referring to *Quinby* v. *Conlan, supra,* said:

"In *Quinby* v. *Conlan,* (104 U. S. 120), we said: 'It would lead to endless litigation, and be fruitful of evil, if a *supervisory power* were vested in the courts over the action of the numerous officers of the land department, on *mere questions of fact presented for their determination.* * * * On this subject we have repeatedly and with emphasis, expressed our opinion, and the matter should be deemed settled." (Italics ours.)

In *United States* v. *Chemical Foundation, Inc., supra,* the court said:

"The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."

The validity of the orders of the President was attacked by the Attorney General, on the ground that they constituted an unlawful delegation of authority, and, on the further

ground that the orders were induced by misrepresentation, and were made without knowledge of the material facts.

The court said:

"The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts.

"The President will be presumed to have known the material facts and to have acted in the light of them."

In the case at bar, there is no allegation that the Secretary of the Interior and the Commissioner of Indian Affairs were not advised of all of the material facts connected with the transaction complained about, and it is not alleged that either of these officers was deceived or misled as to the facts.

In *Martin* v. *Mott*, 12th Wheaton 25, the court speaking *per curiam*, said:

"Whenever a statute gives a *discretionary power to any person to be exercised by him upon his own opinion of certain facts it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.* * * * It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. * * *

"Every public officer is presumed to act in obedience to his duty until the contrary is shown; * * * *it is not necessary to aver that the act which he may rightfully do, was so done, if the fact of the existence of the exigency were averred, it would be traversable, and, of course, might be passed upon by a jury; and thus the le-*

gality of the orders of the president would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury." (Italics ours.)

In *Silberschein* v. *United States, supra,* the court uses this language:

"The statute which creates the asserted right commits to the director of the Bureau the *duty and authority of administering its provisions and deciding all questions arising under it;* and in the light of the prior decisions of this court, we must hold that *his decision of such questions is final and conclusive and not subject to judicial review;* at least, unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious. (Citing many cases.)

"*Since it is not made to appear from the allegations of the petition that any of these exceptional conditions exist, the judgment of the District Court must be and it is affirmed.*" (Italics ours.)

In *Tidal Oil Co.* v. *West, Secretary of the Interior, supra,* the court says:

"There is no averment of fraud or arbitrary action on the part of the Secretary. * * * To enter into a review of the terms of the contract to determine whether the Secretary committed error in the interpretation placed upon it, would amount to converting the present action into a proceeding in error to review the action of the Secretary. This cannot be done. The rule is general that, where the Secretary is called upon, in the exercise of the broad jurisdiction conferred upon him in relation to the disposition and control of

public or Indian lands, to determine his jurisdiction to act through an interpretation of a statute, or rules and regulations lawfully made in compliance with a statute, or to construe a contract made in pursuance thereof, his decision cannot be reviewed or disturbed by injunction or mandamus."

The Question of Barnett's Mental Status.

In its opinion the Circuit Court of Appeals, referring to the provisions of sections 1 and 2 of the Act of May 27, 1908, says:

> "These provisions of the act establish Barnett's legal incompetency to manage his own affairs, and so we need give no consideration to the allegations that he was in fact mentally incompetent." (See opinion, R. 70.)

Later in said opinion said court used the following language:

> "In *Barnett* v. *Equitable Trust Co.*, 21 Fed. (2d) 325 (the case now before this court on appeal, No. 530), Judge KNOX ordered that $550,000.00 in bonds held by the trust company, be returned to the Secretary of the Interior." (R. 71)

Judge KNOX in his opinion decided that the transfer of the bonds by the Secretary to the Equitable Trust Company, on the written request of Barnett, was void, *not because the Secretary had no authority to remove the restrictions which had been placed upon the property of Barnett, nor because of his lack of authority to approve such gifts and donations of his property as he in fact made,*

"but such approval, however honest and disinterested it may have been, cannot give validity to a gift or donation which the apparent donor did not make, and which by reason of mental incompetency he was incapable of making."

Citing:

Jennings v. *Wood*, 192 Fed. 507;
Kendall v. *Ewert*, 259 U. S. 137, 42 S. Ct. 444, 66 L. ed. 862.

The theory of the attorney general, on behalf of the government in its second amended bill in this cause, is that the Secretary of the Interior's action, in transferring said trust funds, was unlawful *because of the mental incompetency of the Indian to initiate the request to the Secretary* to transfer a portion of his property to his wife, and in that behalf cited in its brief to the court Judge KNOX's decision as authority. The Department of Justice at no time has disputed the authority of the Secretary of the Interior, under his regulations, to transfer the restricted moneys of an Indian to his lawful wife upon the Indian's request. The Department of Justice in the *Barnett* suits, for the first time, has questioned the authority of the Secretary to so transfer such funds on the ground that the Indian had not sufficient mental capacity to understand the nature and amount of his property and to comprehend elementary arithmetic and that portion of his property which he attempts to dispose of.

Notwithstanding the declaration of the Circuit Court of Appeals that it need give no consideration to the allegations that Barnett was in fact mentally incompetent,

the opinion reflects that the conclusion of the court, that the Secretary was without authority to approve the request of Barnett, was influenced by the allegation of mental incompetency, and by the decision of Judge KNOX, *supra*, otherwise its decision is in conflict with the theory upon which United States prosecutes this suit.

Judge KNOX, in his opinion in the New York case, said (see 21 Fed. (2d), p. 332):

> "While he (Barnett) is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. * * *
>
> "In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity."

Neither *Jennings* v. *Wood, supra*, nor *Kendall* v. *Ewert, supra*, are authority for the conclusions reached by Judge KNOX in the New York case.

In *Jennings* v. *Wood, supra*, the Circuit Court held that the finding by the Secretary of the fact that an Indian was of lawful age, was not a conclusive finding, inasmuch as the Act of April 26, 1906, invested probate courts with jurisdiction over the leasing of the lands of minor allottees, and that the Secretary of the Interior had no jurisdiction thereof; citing *Morrison* v. *Barnett*, 154 Fed. 617, which held that after the passage of the Act of 1906, the Secretary had no lawful authority to approve or disapprove a minor Indian lease of the Five Civilized Tribes.

The Act of 1908, changed this as to restricted Indian minors. Neither the facts nor the principle of law involved in that case are involved here, and that case is certainly not an authority for the conclusion reached by Judge Knox.

In *Kendall* v. *Ewert, (supra)*, the sole issue was whether Paul Ewert, an Assistant to the Attorney General of the United States, could acquire a title by deed from Red Eagle, a Quapaw Indian.

The question of competency of the Indian to execute the deed was not involved.

The competency referred to was *as to a written dismissal of a suit.*

The invalidity of the deed was due to the fact that Ewert could not take the title by virtue of an Act of Congress, which prohibited a public officer of the United States from taking title from Indians.

That case contains no element of decision upon the authority of the court to review the discretionary judgment of the Secretary of the Interior.

The conclusions of Judge Knox are the first and only expressions of that principle of law as applied to the official authority of the Secretary of the Interior in Indian matters, and stand alone.

Judge Knox expressly found that the Secretary of the Interior had authority to remove the restrictions from alienation of Barnett's lands, and the authority to transfer the bonds to the Equitable Trust Company and Bar-

nett's wife upon the request of Barnett, 21 Fed (2d) 332. And further found that there was no fraud, corrupt purpose or intent on the part of officials of the Interior Department; and that the lease of Jackson Barnett was lawfully executed. (See same opinion.) After making those observations, Judge KNOX further concluded:

> "Whatever may have been his authority to release restrictions upon Barnett's property and admitting the honesty of his belief, and that of his subordinates, that the arrangements made were for the Indian's benefit, he was without authority, as were Burke, McGugin, Ward and Mrs. Barnett, to appropriate and give away property to which they had neither title nor power of disposition."

Quoting further from said opinion:

> "The alleged donor had no real comprehension and understanding of what he was induced to do, and thus was without that clear and unmistakable intention to part with his property, which is, as I understand the law, an essential requisite of a gift *inter vivos*. *Snavely* v. *Henderson*, (C. C. A.) 204 Fed. 978."

Snavely v. *Henderson, supra,* enunciates a rule governing the action of a non-Indian citizen in the making of a gift *inter vivos* of property and involved the issue of whether a transaction between a mother and her son was a gift *inter vivos* or a loan, and has no applicability to the issues involved before Judge KNOX.

It is, therefore, conclusive that Judge KNOX founded his decision solely upon the legal proposition that by rea-

son of Barnett's lack of capacity of mind to understand the nature and effect of the transaction involved, his act was void and the Secretary was wholly without authority to act upon his request.

> "Section 1 of the Act of May 27, 1908, provides that the Secretary may remove restrictions under such terms and conditions as to sale and as to disposal of the proceeds as may be embraced in regulations made by him *for the benefit of the Indian.*" (Opinion Atty. Gen. Oct. 20, 1926, *supra;* Appendix A, page 75.)

An oil and gas lease under the provisions of section 1 is an alienation within the meaning of the act.

—*United States* v. *Gypsy Oil Co.*, (8th Circuit) 10th Fed. (2d) 487;

Moore v. *Sawyer*, 167 Fed. 826;

Eldred v. *Okmulgee Loan & Trust Co.*, 22 Okl. 742, 98 Pac. 929.

Under the provisions of sections 1 and 2 of the Act of May 27, 1908, Congress vested the administration of this trust in the Secretary of the Interior "without specific limitations of the manner in which he might administer; hence the power so conferred is broader than any power which might have been specifically conferred." (Opinion Atty. Gen., *supra;* Appendix A, page 75.)

The consent of Jackson Barnett to the exercise of that authority by the Secretary was given when he executed the lease, as was said by the attorney general in his opinion (Appendix A, *supra)* (point 7, sub-div. A), thus:

> "No disposal of such proceeds so made by the Secretary without the consent of the Indian lessee,

Such consent is, as a matter of fact, actually obtained in advance by the Secretary before he approves the proffered lease. Every lease executed contains a provision that the lease is made subject to the rules and regulations of the Secretary of the Interior relating to the leasing of said land. Up until July 7, 1925, the provision inserted in all oil and gas leases was as follows: 'This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force, relative to such leases. All such regulations are made a part and condition of this lease'."

The attorney general further says (sub-division "C"):

"Where the Indian is *sui juris*, he, himself, consents by his signature to the lease * * *."

In this case the lease was executed by Jackson Barnett *sui juris*, March 5, 1912, and all the terms of the lease run to Barnett as lessor. (See record, Case No. 530, pages 14-20.)

Since the opinion of Judge KNOX in the New York case reflects the theory upon which the Department of Justice has proceeded in this case and since that decision has become a basis of authority in this case in the Circuit Court of Appeals, we take the liberty of commenting at some length upon what we regard as a misconception by Judge KNOX of the principle of law governing the exercise by the Secretary of the Interior of a discretionary power in the administration of his duties in Indian affairs.

We challenge this opinion as being in conflict with the underlying *basic* reasons for the delegation by Congress to the Secretary of supervisory control over the contracts and estates of restricted Indians.

Judge KNOX held, in effect, that Barnett must have sufficient understanding and intelligence to know the nature, extent and value of his property and estate, and of the extent and portion thereof which he was donating, and of the terms and conditions of the donation, and its effect upon his estate before he has the capacity to initiate such transaction. *This eliminated entirely from the case the basic reason for the supervision of his estate by the Secretary of the Interior,* and did not recognize any element of judgment or understanding in the matter by the Secretary. Under such a rule, there was no need or use for supervision, for, *with such understanding the Indian could transact his own business as well as the average non-Indian citizen.*

The degree of mental capacity of the Indian, who is neither an idiot nor an insane person, certainly cannot limit, restrict or modify the lawful authority of the Secretary of the Interior to dispose of or disburse the restricted funds derived from oil leases under his regulations aforesaid.

His authority to act in this matter, did not rest upon a given degree of intelligence in Jackson Barnett. Congress placed no such limitation upon the exercise of his discretion, and the courts cannot do that which Congress did not see fit to do.

What is said in the bill as to the mental capacity of Barnett, can be said of practically every one of the older full-blood Creek Indians, and a majority of the younger ones, all restricted alike, whether educated or uneducated, and all within what has always been classed as "Congres-

sional Restrictions," without regard to their individual mental capacity.

In every case where the Secretary exercised his discretionary judgment to remove the restrictions from the land, or to release the restricted moneys and disburse them upon the request of the Indian, a necessary element in the question before him, was *to consider and determine the mental capacity of the Indian as to the wisdom of the request.* The Indian's judgment as to what disposition of his money should be made, did not determine the action of the Secretary—it was the Secretary's judgment as to the wisdom and propriety of the act which controlled.

Barnett had sufficient mental capacity to execute a valid oil lease on his lands, and the execution of the lease was no less solemn or important in the law than the execution by him of a request to transfer a portion of his bonds to his wife. The lack of capacity to judge of the nature and effect or of the advantageous character of the lease to himself, was compensated for by the interposition of the judgment and experience of the Secretary, and thus the lease, when approved, was *for the best interest of the Indian,* and likewise Barnett's lack of knowledge of the extent and value of his property and of the effect of his act in transferring to his wife a portion of his bonds, was equally compensated for by the interposition of the judgment and experience of the Secretary in that behalf, and his judgment is no less conclusive in the one case than the other.

Barnett's Request Not Void Under the Laws of the District of Columbia.

The entire transaction pertaining to the Jackson Barnett donations was consummated in the District of Columbia and it is undebatable that the *lex loci contractus* determines the validity of a voluntary gift *inter vivos*, of personal property.

The gift of Jackson Barnett was burdened with a trust for the benefit of the donor and if he were otherwise capable of making the gift, it was valid thus burdened.

—Merwin on Equity, p. 113;

Viney v. *Abbott*, 109 Mass. 300, cases cited;

Castleman v. *Smith*, 148 La. 233, 86 S. 778.

Such gift needs no consideration to support it—

Castleman v. *Smith, supra.*

The common law of Maryland was in force in the District of Columbia as to contracts and the power to make them.

—Annotated Code, Dist. Col., Chap. I, Sec. 1;

Crutchfield v. *Easterday*, 26 App. Dec. 89.

Mental Weakness.

Weakness of intellect if not amounting to insanity does not justify setting aside a contract made unless upon grossly inadequate consideration or of an undue advantage taken of the inferior mentality.

—*Conley* v. *Nailor*, 118 U. S. 113;

Crutchfield v. *Easterday, supra;*
6 Ruling Case Law, Sec. 50;
Dennett v. *Dennett,* 84 Am. Dec. 97;
Tracy v. *Sackett,* 59 Am. Dec. 610.

In *Hulda M. Fetter* v. *William H. Fetter, et al.,* Supreme Court of District of Columbia, 44 Washington Law Reporter 87, the court said, touching one of the issues of that case:

> "In this jurisdiction it is well established that *weakness of intellect, if not amounting to insanity,* does not justify setting aside a contract unless accompanied by gross inadequacy of consideration, or unless undue advantage is taken of inferior mentality,—
>
> *Conley* v. *Nailor,* 118 U. S. 113;
> *Crutchfield* v. *Easterday,* 26 App. Dist. Col. 89, 33 W. L. R. 504."

In *Conley* v. *Nailor,* the United States Supreme Court used the following language:

> "Extreme weakness of intellect, even when not amounting to insanity in the person executing a conveyance may be sufficient ground for setting it aside, when made upon a nominal or grossly inadequate consideration * * *."

At common law there is no restraint upon the husband to transfer over to his wife by gift *inter vivos* his personal property.

Under Chapter 33, 1919 Revision, Code, Dist. Col. Laws, this right is clearly established as to both real and personal property.

The District of Columbia has no statutory definition of the limitation of the power to contract. The common law rule governs.

In *Sawyer* v. *White*, Nos. 1816 and 1817, 122 Fed. 223, the court said:

> "But the question of his mental capacity is not whether or not the powers of his mind were impaired, or whether or not he had ordinary capacity to do business, but whether or not he had any—the smallest—capacity to understand what he was doing, and to determine intelligently whether or not he would do it. *Mann* v. *Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 548, 86 Fed. 51, 62; *Rugan* v. *Sabin*, 3 C. C. A. 578, 53 Fed. 415, 421; *Stewart's Ex'r* v. *Lispenard*, 26 Wend. 303; *Ex parte Barnsley*, 3 Atk. 168; *Hill* v. *Nash*, 41 Me. 586, 66 Am. Dec. 2661; *Jackson* v. *King*, 4 Cow. 216, 15 Am. Dec. 354; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97. * * *"

—*In re Strickland*, L. R. 6 Chan. App. 266;

In re Knapp Estate, 41 N. Y. Suppl. 156;

Am. Law Guardianship, Sec. 138.

Under the foregoing decisions, laws of the District of Columbia and the generally expressed common law, the act of Jackson Barnett was *not void*.

Barnett is not alleged nor is it claimed he is either an idiot or a lunatic.

In *Lewis* v. *Teegarden*, 40 N. W. 1047, the court said:

> "With deference to the authority cited, it is our judgment that the capacity to execute a will is the perfect requisite for the execution of a gift *inter vivos*."

See Shouler on Wills, Sec. 81.

Not having been adjudged a mental incompetent he could lawfully execute a will (p. 36, *supra)* or act as any other adult full-blood Indian.

Not being insane nor an idiot his act was not void and there was a tangible legal transaction coming to the hands of the Secretary and Commissioner upon which they might and did act.

The writ in cause No. 530, *United States v. Equitable Trust Company, et al.*, brings before this court for review the decision of Judge Knox upon the question of the authority for and the legality of the Secretary's action in approving the request of Jackson Barnett and transferring said bonds to the Equitable Trust Company.

On pages 8 and 9 of the brief for the United States, in No. 530, *United States* v. *Equitable Trust Co., et al.*, supporting the writ of *certiorari*, the Solicitor General says:

> "The case was tried November 16 to 24, 1926, before the District Court. (R. 1-2.) *The single controlling issue of fact on the Government's pleading was the mental condition of Barnett. The single important issue of law was whether, in view of Barnett's mentality, the Secretary of the Interior had the power to authorize the disposal of the funds in question. On August 9, 1927, the District Court rendered an opinion* (R. 83) *holding that the gift was void because of the plaintiff's incompetence and lack of comprehension and understanding of his action in making the same* (R. 94-95); *that the gift could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds to the Secretary of the Interior to be held by him as the property of plaintiff* (R. 95-96).

On November 21, 1927, a decree to this effect was entered. (R. 96.) The decree, however, retained jurisdiction of the cause, and the property, for the purpose of entertaining and deciding applications by counsel for plaintiff, and counsel for defendants, for allowances out of the property for their services and disbursements.

"Such applications were postponed pending an appeal taken by the defendant The American Baptist Home Mission Society. Such appeal was dismissed May 7, 1928, by the Circuit Court of Appeals because The Equitable Trust Company, another defendant, had not been made a party. 26 F. (2d) 350. Application made to this court for a writ of *certiorari* was thereafter denied (278 U. S. 626), *so that the decision of the District Court became final on the merits of the original action.*" (Italics ours.)

Upon the foregoing statement it is apparent:

(a) That the determination of the issue brought here by the Government's petition involves a determination of whether Judge KNOX's decision in that cause as to the authority of the Secretary is erroneous.

(b) A correct decision by this court upon the legality and propriety of the allowance of attorneys' fees, without the consent of the Secretary of the Interior, necessarily cannot be reached without deciding the issue before the District Court as to the Secretary's authority to transfer the bonds.

(c) That by reason of the reservation by the lower court of jurisdiction to make the further order as to counsel fees, said decree of November 21, 1927, was not a final decree, but became final upon the judgment and order of

January 8, 1929, allowing counsel fees to Bailey's counsel out of the funds.

In support of our contention that the decree of November 21, 1927, which the Solicitor General contends became final upon the dismissal of the appeal therefrom by the Baptist Society (26 Fed. (2d) 350), upon the merits of the cause, was not a final decree, and, therefore, not then appealable, we cite the following opinions of this court:

Arnold v. *United States*, 264 U. S. 434, 68 L. ed. 375, quoting from the opinion:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, 264, 37 L. ed. 443, 444, 13 Sup. Ct. Rep. 590; *Collins* v. *Miller*, 252 U. S. 364, 370, 64 L. ed. 616, 618, 40 Sup. Ct. Rep. 347; *Oneida Nav. Corp.* v. *W. & S. Job. & Co.*, 252 U. S. 521, 522, 64 L. ed. 697, 40 Sup. Ct. Rep. 357; and cases therein cited.
>
> "And it is clear that the present case does not come within the seeming exception to this rule that an adjudication, final in its nature as to a matter distinct from the general subject of the litigation, and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. See *Williams* v. *Morgan*, 111 U. S. 684, 699, 28 L. ed. 559, 565, 4 Sup. Ct. Rep. 638, and *Collins* v. *Miller*, 252 U. S. 371, 64 L. ed. 619, 40 Sup. Ct. Rep. 347.

There has been no final adjudication of the amount which Guimarin & Company is entitled to recover on the bond; and, furthermore, its right to a recovery is not distinct from the general subject of the litigation, but involves the determination of questions affecting the intervening creditors, who are likewise parties to the suit, as well as itself, and which, under the statute, are to be determined in a single action"

Mower v. *Fletcher*, 114 U. S. 127, 29 L. ed. 117:

"That judgment is final for the purposes of a writ of error to this court, which terminated the litigation between the parties on the merits of the case, so that if there is to be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostick* v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, and the numerous cases there cited. * * * Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered."

North Carolina R. R. Co., et al., v. *Swasey, et al.*, 90 U. S. 405, 23 L. ed. 137:

"With these well settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the state must pay in order to stop the sale has not been determined; neither has it been determined what amount of stock may be sold if the debt is not paid. In each of these questions the state has a direct interest, and through its representatives in court has the right to be heard. They must be settled before the litigation can be said to be at an end."

Wheeler v. *Harris*, 13 Wall 51, 20 L. ed. 531:

"A decree of affirmance, without taxation of costs

and without specifying the sum for which it is rendered, is defective and is not a final decree."

In *Collins* v. *Miller*, 252 U. S. 364, 64 Law ed. 616, cited by this court in *Arnold* v. *United States*, *supra*, this court reviews former decisions and lays down the doctrine that a decree which cannot be immediately executed upon an affirmance is not a final decree.

The United States under the first decree could not have executed the judgment in its favor and have the fund transferred to the Secretary, the amount of the award not having been finally determined; nor, if a proper appeal were had, could it have had execution on an affirmance thereof, for the same reason.

It will be remembered that counsel for Bailey, next friend, representing Barnett in the New York case, sought allowances under a contingent fee contract executed by said attorneys with Bailey as acting guardian of Barnett, copy of which is set out (Tr. record No. 530, pp. 127-130) under the terms of which contract the attorneys for Bailey are entitled to compensation *only* in the event "of the recovery of said funds," and which contract further in terms assigns to said attorneys a percentage of "Barnett's cause of action."

Judge Knox, in his decision, after holding that the transfer of the bonds by the Secretary to the trust company upon Barnett's request was void and unlawful because of Barnett's lack of mental capacity to make the donation, in his second decree awarding counsel fees used the following language (p. 162):

"Had the Secretary of the Interior never permitted the fund which forms the subject-matter of this suit to go beyond his possession and control, it is agreed that the court would be powerless to grant relief to any of the present petitions. The then Secretary, however, saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress. * * * The fund is now a *res* within the control of this court, and justice requires that such *res* should bear the fees and expenses of its preservation."

The Circuit Court of Appeals in its opinion (21 Fed. (2nd) 325) sustained the authority of the District Court awarding counsel fees, but upon the theory that the transfer of the bonds by Barnett with the Secretary's consent passed the funds to the trustee lawfully. Thus the court says:

"When, therefore, Barnett, with the Secretary's consent, gave the securities to the Mission, the fund passed to its hands unrestricted and as free funds * * *. We can, therefore, see no reason to say the court's wings were clipped by restrictions which the Secretary had lawfully if improvidently removed."

The Solicitor General took the position in the Circuit Court of Appeals that the findings of Judge KNOX in the first instance, that Barnett had not sufficient mental capacity to make the donation, therefore, its approval by the Secretary was wholly void; and in the second instance, that the transfer of the bonds to the trust company was a lawful surrender of further control over the bonds by the Secretary, were fatally inconsistent, and in that regard says

(quoting from the brief of the Solicitor General in that case):

> "The position of the court in the decree here for review is inconsistent. The fund is either restricted or it is unrestricted, and if the approval by the Secretary of the Interior removed the restrictions therefrom, the court is without power to reimpose such restrictions, such being a prerogative resting solely with Congress."

In the light of the foregoing, it seems that this court must necessarily review the decision of Judge KNOX upon the question of the authority or lack of authority of the Secretary in the first instance to transfer the bonds, which question of necessity, is involved in the legality or propriety of the decree of the court fixing the award of counsel fees.

V.

The Action of the Secretary of the Interior Was Not Arbitrary or Capricious.

The Circuit Court of Appeals in the case at bar, in its opinion used the following language:

> "And so we conclude there was *arbitrary* and unthorized action by the Secretary violative of the trust, with full knowledge on the part of all participants." (R. 72) (Italics ours.)

The United States in its proffered second amended bill does not charge that the action of the Secretary was "arbitrary or capricious." If the term "arbitrary," as thus used by the Circuit Court of Appeals, is in the sense that

the Secretary acted without any evidence or any practical reasons to support his acts, the conclusion of the court is clearly not supported by either allegation or proof. If such conclusion was based upon the allegation in said proffered bill that the action of the Secretary "was not for the benefit of Barnett," then such conclusion is not founded upon any proof. The determination of that question, even if it be within the proper jurisdiction of the court (which we dispute) could not be made without the true facts and reasons before the court upon which the said officials acted.

The *undisputed* facts upon which said officials based their action have been presented in court *(Barnett, Incomp., v. Equitable Trust Co., et al.)* and before Committees of Congress. No transcript of the record in the New York case has ever been prepared. A complete history of the Barnett transaction as shown by files in the Indian office, and a full recital of the reasons and basis of the departmental action, were given before the House Committee on Indian Affairs, in 1925 (House Record No. 1527, 68th Cong., 2nd Sess.), and again, before a sub-committee of the Committee on Indian Affairs of the United States Senate, pursuant to S. Res. No. 79, in 1929.

Senate Hearings, 70 Cong., 2nd Sess., Part 4, pp. 1624-1730.

These records contain detail of facts as given by the testimony of former Commissioner of Indian Affairs Burke, Assistant Commissioner Merritt, Assistant Secretary Goodwin, and Creek Attorney A. J. Ward, before the House Committee on Indian Affairs and the testimony of former

Commissioner Burke before the Senate Committee on Indian Affairs, all of which facts so stated are in evidence in the New York case.

These stated facts show conclusively that the action of the officials were founded upon substantial and commendable policy and reasons, and wholly refute any claim that the acts of the officials were "arbitrary or capricious." The conclusion of the Circuit Court of Appeals is contrary to all the undisputed facts, and if that issue be considered here, we invite this court to review the testimony and statement of facts as shown in the public documents referred to, *supra*, and especially the testimony of former Commissioner Burke before the Senate sub-commmittee of Indian Affairs.

Policy of the Transaction.

Resting in the judgment of the Secretary of the Interior and Commissioner of Indian Affairs were all questions of policy.

Whether Barnett's request and the disposition of his funds thus proposed was for the "best interest of the Indian" in the light of all the facts and circumstances then existent—in view of the expiration in 1931 (Sec. 19, Act April 26, 1906, 34 Stat. L. 137), of all restrictions upon his lands and money—in view of the security to him by the trust arrangements provided for in the two transfers—of an income during his natural life of ample funds to keep him in ease and luxury ($27,500 annually)—whether provision for the security of Barnett's wife made before his death was

for his benefit—whether placing in her hands for her unrestricted use ample funds with which she might purchase a comfortable and permanent home for Barnett were to be considered in the determination of the question of "the best interest of the Indian," were properly within the exclusive judgment of the Secretary—he was of course in possession of all the facts and circumstances upon which to act.

The policy therefore which governed the determination by the Secretary of the questions thus presented to him was for his department to determine, and not for the Department of Justice. And to the same effect is it also a policy of the Interior Department to determine whether litigation shall be instituted to set aside or modify the official action of that department, except with this qualification, that where fraudulent official action has been taken by the Secretary of the Interior or other official, then it is within the authority of the Department of Justice to determine.

At no time during the Barnett litigation has the Department of Justice felt itself safely grounded upon a question of policy relative to that department's action. This is reflected in the opinion of March 4, 1929, upon the report of Mr. Pierce Butler, from which we quote:

> "There is a question of policy that is not for my determination but which should be pointed out. If the wife survives the Indian, she will inherit his property free of restrictions, if there be no testamentary disposition otherwise. * * * Therefore, the public good that was served by the recovery from the Mission Society of the gift for the benefit of the Indian School

is obscure, as the situation now is. That a useful purpose is served by expenditures for the recovery and addition to the Indian's estate of the other gifts for the wife to inherit in all probability in a few years is at least a question. It is reasonably certain that if the marriage be annulled and the wife cannot inherit there will be attracted many claimants on the ground of heirship. Expensive, speculative and protracted litigation will ensue. At last the benefit any Indian would receive from the estate would be doubtful."

Conclusion.

The array of *Barnett* cases, as shown by the record in No. 530, *United States* v. *Equitable Trust Company, et al.*, had their origin in the contingent fee contracts executed in 1923 between certain alleged relatives, who claimed to be prospective heirs of Barnett, and the law firm of Cochran & Ellison, and C. B. McCrory, attorneys at Okmulgee, Oklahoma. A copy of this contract appears on pages 152-153 of record in said cause.

Coupled with that contract, of course, is the later contingent fee contract by Bailey, alleged next friend of Barnett, who then claimed to be the legal guardian of Barnett in Oklahoma, with the law firm of Hummer & Foster of Henryetta, Oklahoma. A copy of this contract appears in the same transcript, pages 127-130.

These attorneys initiated the suits in the beginning. Later, the Department of Justice entered into the suits, first by intervention in the New York and Washington cases, later in other jurisdictions.

The story of how the Department of Justice came into the cases is revealed by the affidavits of Mr. Carroll G. Walter (Trans. No. 530, pp. 101-113, 154-158), Mr. Rayburn L. Foster (Trans. same case, 113-127), and Mr. Almond D. Cochran (Trans. same case, 137-141, 158-160), who are the leading counsel in the suits filed in New York and Washington by Bailey, next friend.

A reading of these statements reveals a most unusual and extraordinary situation in inter-Departmental administration. These statements, which are admittedly true, reveal a complete departure by the Department of Justice from its time honored rules—that opinions of that department would only be written upon the request of heads of other departments, regularly submitted, and then only upon matters which might then be pending before said department for official action; and—that no suit or proceeding by the Department of Justice would be initiated or prosecuted, in any court, save upon the official request of the President, a head of another department or by direction of Congress.

Here the interventions were induced by the activities and influence of private persons contrary to the official requests, and even protests of the Secretary of the Interior. (See especially statements of Mr. Cochran, on pages 139-140.) It there appears, and is true, that even after the Department of Justice had filed answers for the Secretary of the Interior and Commissioner of Indian Affairs in the suits filed by Mrs. Bennett, in which answer was pleaded the validity and regularity of the acts of the Secretary in the

Barnett gifts and transfers, these gentlemen representing private persons induced the Department of Justice to change its course of action therein, and without the consent of said officials withdrew said answers from the files in the New York case aforesaid, and intervene in the New York and Washington cases attacking the action of the Secretary and Commissioner as unwarranted and unlawful. It appears that tremendous pressure was being brought by the Interior Department to induce the Justice Department to either stand back of the Secretary or withdraw from the suits. Questions of policy were discussed, which Mr. Cochran states "tended to delay and impede any action by the Government in behalf of the plaintiff." Notwithstanding all this opposition these attorneys prevailed with the Department of Justice over the Secretary and one of the important items for which counsel claimed compensation in that case, was for inducing the Department of Justice to inter into the suits on their side and in keeping that department on their side and against the Secretary—thus, in the language of Mr. Cochran (Tr. 159):

> "In brief, after the Government was in the case, I performed a vast amount of services in attempting to keep it in the case on the side of the plaintiff."

And again quoting from Mr. Walters' affidavit (Tr. 112):

> "That the Department of Justice finally intervened in the case on the side of the plaintiff and assisted in its prosecution is due entirely to the strenuous efforts of counsel for the plaintiff, Mr. Cochran and Mr. Foster, as is more fully set forth in their affidavits, to which reference is hereby made."

Doubt and uncertainties beset the Department of Justice throughout its whole course in this litigation. Undoubtedly, by reason of the pressure and influence of the attorneys representing Bailey the Department of Justice was first induced to incorporate implications and charges of fraud on the part of the Secretary and Mr. Burke, but later, because of a complete absence of evidence to support such, these charges and implications were withdrawn at the New York trial by order of Attorney General Sargent. Mr. Cochran states in his affidavit (p. 159, *supra)* that he participated in the preparation of the Government's brief filed in the District Court after the trial, and that by reason of these withdrawals the attorneys preparing same were hampered and embarrassed and as he stated:

> "Most of the time was devoted to efforts to phrase something which would enable the Government to stay in court at all, without violating the limitations which had been placed upon those engaged in the preparation of the brief."

The history of the *Barnett* litigation reveals a complete lack of faith in the form and theory of the different bills and amendments filed in all cases by the Department of Justice. Its repeated abandonment of one theory and allegation and the adoption of others, adds to the weakness of the Government's position herein.

As was expressed by Mr. Butler, in his report to the Attorney General touching the various *Barnett* suits, as to the wisdom and propriety of the further prosecution of those actions—it is clear that that department itself now

doubts the wisdom or the propriety of their prosecution—so there never has been a moment of time since the Department of Justice entered these cases that it has been firmly grounded either in the wisdom or the propriety of its action or the soundness of its claims in that behalf.

Its contention here—is as revolutionary as its policy. It will be fatal to the exercise by the Secretary of discretionary judgment in Indian matters if the contention of the Department of Justice be here upheld.

If this court holds that the lack of understanding or, in other words, mental qualification of Barnett, as alleged in the second amended bill, qualified the power and authority of the Secretary in the administrative exercise of his judgment and discretion relative to the restricted income from the Indian's oil and gas lease, and that his judgment is subject to be reviewed by the courts, as here attempted, then the usefulness of said official will be at an end in Indian affairs, and the conduct of Indian affairs will be transferred to the courts.

It is claimed here that the action of the Secretary was an abuse of discretion. That is all that the claims of the Department of Justice amounts to and in its last analysis that is all that the Circuit Court of Appeals held. That claim is completely answered by the words of this court in a recent decision, *Wilbur v. U. S., ex rel. Kadrie,* 74 L. ed. 441, Adv. Opin. No. 10, p. 441, 1929, relating to the authority of the Secretary of the Interior in certain Chippewa Indian matters in a suit assailing his action, thus:

"But in the last analysis, this is a mere argument, seeking to destroy a lawful power by the suggestion of a possible abuse."

This court, therefore, should reverse the judgment and order of the Circuit Court of Appeals, and sustain the judgment of the District Court dismissing the suit.

Respectfully submitted,

CHAS. B. ROGERS,
Tulsa, Oklahoma,
Attorney for Petitioner.

Appendix "A."

Interior Dept. Received Dec. 11, 1926. Office of the Secretary.

Department of Justice.
Office of the Attorney General.
Washington, D. C.

Hon. Hubert Work, December 11, 1926.
Secretary of the Interior,
Washington, D. C.

My dear Mr. Secretary: In accordance with your informal request, submitted through Assistant Secretary Edwards, there is enclosed herewith copy of the memorandum of October 20, 1926, prepared by Mr. George P. Barse of this department, referred to in a letter of October 22, 1926, sent by me to the United States Attorney in New York City in connection with a suit of *Jackson Barnett* v. *Equitable Trust Company, et al.* The view therein expressed with reference to the amendment of October 7, 1922, of the regulation of the Secretary of the Interior relating to the disposal of proceeds of oil and gas leases of restricted lands of members of the Five Civilized Tribes, is my present view. A copy of the letter of October 22, 1926, and also of a letter of a similar nature, of October 26, 1926, to the United States Attorney in New York, have already been furnished to you by my letter to you of October 26, 1926.

I am sending you by separate mail a reply to your letters of October 4 and November 3, 1926, requesting my opinion as to the authority of the Secretary of the Interior to disburse restricted funds of allottees of the Five Civilized Tribes in cases where guardians of incompetents have been appointed.

Respectfully,

Jno. G. Sargent,
Attorney General.

Inc. 52474

Washington, D. C.,
October 20, 1926.

MEMORANDUM FOR THE ATTORNEY GENERAL.

In re: Question of whether or not the amendment of October 7, 1922, of the regulations of the Secretary of the Interior, relating to disposal of proceeds of oil and gas leases of restricted lands of the members of the Five Civilized Tribes could lawfully be made.

The Amendment of October 7, 1922.

"And *provided further*, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases."

Preliminary Observation.

There appears to be no case in point on this question and therefore it becomes necessary to decide it by a process of reasoning from established principles. This will be done by the statement of a series of basic propositions and the conclusion therefrom derived.

Propositions.

1. *Power and Authority of Congress.* The power and authority of Congress to impose restrictions upon the lands of the Five Civilized Tribes, provide for the removal of those restrictions and the disposal of the proceeds, for the benefit of the Indian, is no longer open to question. The right of exclusive legislation in this respect was reserved in

section 1 of the Oklahoma Enabling Act, and was acquiesced in by the state. The restrictions imposed upon the lands of these Indians was a continuance of the exercise by the United States of its guardianship and protection over the Indians and the issuance of allotments and the granting of citizenship "was in no wise inconsistent with the retention of control *over the disposition of the allotted lands* * * *" *Heckman* v. *United States*, 224 U. S. 413, 436; *Bowling* v. *United States*, 233 U. S. 528.

2. *Action of Congress.* Section 1 of the Act of May 27, 1908, provides that the Secretary may remove restrictions under such terms and conditions as to sale and as to disposal of the proceeds as may be embraced in regulations made by him, *for the benefit of the Indian.*

Section 2 of that act provides for oil and gas leases of these restricted lands under such rules and regulations as may be made by the Secretary of the Interior. Although the latter provision, as to leases, does not specifically state that such rules and regulations shall embrace the control of the disbursement of the moneys thereby derived, yet of course it necessarily follows that such must be part of the purpose of the trust thereby imposed in order that complete protection may be afforded to the Indian lessor. *United States* v. *Brown*, 8 Fed. (2d series) 564.

3. *Nature of Proceeds.* From the foregoing (points 1 and 2, *supra*), it follows:

(a) That the moneys derived from the leasing of restricted lands constitute a *federal* fund, the administration of which is a trust for the benefit of the Indians. *United States* v. *Thurston County*, 143 Fed. 237; *United States* v. *Brown*, *supra*.

(b) That the State of Oklahoma cannot pass any law interfering in any way with that administration, and that guardians of Indians appointed under state law can neither

demand from the federal government the payment to them of such funds so held, nor in any way direct or dictate their disposal contrary to the will of Congress.

Section 2 of the Act of May 27, 1908, specifically provides, as to the approval of the Secretary of the Interior of oil and gas leases of restricted lands, and the power to make rules and regulations concerning the same, that

> "the jurisdiction of the Probate Courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions * * *."

4. *Procedure Prescribed for Administration.*

(a) It is clear that Congress could have *specifically* indicated the precise disposition of proceeds from the sale or leasing of restricted lands for the benefit of the Indian, and could have directed that said funds be disbursed by the Secretary at a specified sum per month direct to the Indian, or by the Secretary disbursed for the support and maintenance of the Indian in other respects than by payments direct to him, and as to such disbursement it is clear the laws of Oklahoma and the guardians appointed under those laws could have no effect whatever. The existence of guardianship does not prevent the creation of a separate trust, the administration of which is beyond the control of the guardian. There is no necessary conflict.

(b) Congress saw fit to accomplish its purpose of protection of the Indians by creating a trust, by sections 1 and 2 of the Act of 1908, and vested the administration of it in the Secretary of the Interior *without specific limitations* of the manner in which he might administer. Hence, the power so conferred is broader than any powers which might have been specifically conferred.

(c) It follows that the regulations made by the Secretary, in his judgment and discretion in the administration

of his trust, the necessity of those regulations, their effectiveness to accomplish their purpose, and his acts in the control and disbursement of said funds in accordance with said regulations, cannot well be questioned, as indicated by well settled general principles, unless there is an abuse or arbitrary exercise of that discretion. *Wade* v. *Fisher*, 39 App. D. C. 245, 248; *United States, ex rel. Lane*, v. *Sykes*, 49 App. D. C. 48.

5. *Same—Decisions Defining the Secretary's Powers of Administration.*

(Here follow quotations from *United States* v. *Brown, et al., supra*, see same on page 14 of brief; also *United States* v. *Hinkle, supra*, see same, brief, page 20, and *Parker* v. *Richard, supra*, see same, brief, page 20.)

6. *Validity and Purpose of the Amendment of October 7, 1922, to Regulation 24.*

As section 2 of the Act of 1908 specifically grants the Secretary power to make rules and regulations as to oil and gas leases, it follows that the amendment to the rule in question is within his power unless, as already indicated, it constitutes an arbitrary exercise of or abuse of his discretion. (See discussion under point 4 hereof.)

It will now be sought to be shown that the amendment is reasonable in purpose and operation and designed to accomplish the true protection of the *cestui que* trust.

(a) The responsibility for the administration of the trust has been placed by Congress upon the Secretary as its agent. (*Wade* v. *Fisher*, 39 App. D. C. 245, 248.) It follows that whether he will delegate a portion of his functions to a state guardian, to some other agency, or exercise it himself, must be a matter solely in his discretion. The responsibility carries with it the accountability.

(b) Experience has demonstrated that abuses in administrations of such trust funds sometimes occur where the

Secretary surrenders control of the disbursement to a state guardian, and that a course of unvarying delegation of the administration of such trust to the state guardian is unwise and not for the best interests of the Indian beneficiaries, as was formerly the procedure under Rule 24 prior to its amendment. It is no answer to say that the state guardians are accountable to the state courts. The responsibility for delegating the trust to the state guardian is in the Secretary and he must determine whether or not, in a particular case, he considers it wise to entrust such funds to the appointed guardian.

(c) The amendment does not *preclude* delegation to the state guardian of partial administration of the trust, and does not supersede or repeal original section 24 of the regulations. It supplements section 24, and makes possible a flexible administration, susceptible of rendering the best protection to the interests of the Indian beneficiary. Under section 24 and the amendment, the Secretary may pay reasonable amounts direct to the Indian where exigency or circumstances seem to render it advisable; may disburse funds to other persons for the benefit and immediate use of the Indian; may entrust substantial amounts to the state guardian, with or without restrictive conditions as to disbursement and supervision, and, in a word, exercise direct supervision and administration of his trust, or not, as his best judgment dictates.

Can there be any question under the foregoing observation, as to the reasonableness of purpose and function and operation of the amednment to section 24?

7: *Consent of Indian Allottee.*

(a) It is clear that under section 2 of the Act of 1908 the Indian has the *option of refusing to lease* his lands if he is not satisfied that the proceeds to be derived therefrom shall be subject to disposal by the Secretary in accordance

with the regulations in that connection made by the Secretary, and in the event of such refusal he may retain his lands intact for the restrictive period imposed by Congress, and his rights will not in that event be violated because he still holds his lands and has the use of them.

(b) No disposal of such proceeds is made by the Secretary without the consent of the Indian lessee. Such consent is, as a matter of fact, actually obtained *in advance* by the Secretary before he approves the proffered lease. Every lease executed contains a provision that the lease is made subject to the rules and regulations of the Secretary of the Interior relating to the leasing of said lands. Up until July 7, 1925, the provision inserted in all oil and gas leases was as follows:

> "This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease."

Since that time a similar provision is inserted, which is as follows:

> "*Provided.* During the period supervision hereof is retained by the Secretary of the Interior, this instrument shall be subject to the supervisory regulations of said Secretary."

(c) Where the Indian is *sui juris* he, himself, consents by his signature to the lease, and it will be noted in this connection that section 6 of the Act of 1908 provides for the appointment of repreesntatives of the Secretary of the Interior, whose duties, *inter alia*, shall be "to counsel and advise all allottees, *adult or minor*, having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made * * *."

If the Indian is under guardianship, consent is given by the guardian in executing the lease and by the state court in authorizing the execution of the lease.

(d) Although it has been the custom and practice of the Secretary, purely as a matter of precaution, to incorporate in the lease specific reference to the regulations, and by that reference expressly make the regulations part of the lease, yet it is believed that such regulations would become part of the lease even though specific reference thereto were not made in the lease. The Indian lessor is, of course, *charged with notice* of the provisions of section 2 of the Act of 1908 to the effect that all leases must be made subject to the rules and regulations of the Secretary. Hence, it follows that the act of making the lease is an adoption of and acquiescence in such regulations as may be made.

With reference to the rules of the Secretary of the Interior the Supreme Court said in *Caha* v. *United States*, 152 U. S. 211, 222, as follows:

> "Wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

There is thus no legal basis for either the Indian or his guardian, or the state court, to question the regulations, inasmuch as the consent of the Indian to the operation of the regulations attaches in advance, either by express provision in the lease or by implication of law from the fact of execution of the lease.

Conclusion.

I am therefore clearly of the opinion that the amendment of October 7, 1922, to section 24 of the regulations is a valid exercise by the Secretary of the authority conferred upon him by section 2 of the Act of 1908, to make rules and regulations concerning oil and gas leases of restricted Indian lands.

Respectfully submitted,

George P. Barse, Attorney.

Appendix "B."

Extract from opinion of attorney general of October 5, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"* * * Congress, however, has for many years placed supervision over Indian affairs in the Secretary of the Interior, as indicated in the Act of March 3, 1849 (9 Stat. 395), and sections 441 and 463 of the Revised Statutes of 1878. * * * Under these statutes, the Secretary of the Interior was not empowered to consent to the release of the restrictions thus imposed. Later, however, Congress passed statutes which permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior. * * *

"The Secretary has the power to remove restrictions from certain Indian funds. * * * Upon the removal of such restrictions from any fund, and the release of the fund to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with the trust company, I know of no legal objection to his doing so. * * *"

Appendix "C."

Extract from the opinion of the solicitor for the Interior Department, dated June 26, 1929, concerning power of the Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"These all indicate that the Secretary of the Interior stands largely in the capacity of a *quasi* or *de facto* guardian in the protection of restricted Indians and of their property." (c-8)

"* * * the power and duties so resting in the Secretary of the Interior cannot well be transferred or delegated to any other agency, state or federal. Admittedly, the creation of a trust estate out of restricted Indian funds would lodge in some other tribunal or agency future supervision or control over such funds. From time to time under statutory authority hereinbefore referred to, Congress has authorized the Secretary of the Interior to remove restrictions * * *. When such action is had, Indians so situated can thereafter make such disposition of their property previously restricted, by creation of trust estates, or otherwise, as they may see fit to do. (p. c-9) * * *"